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A *nisi prius* court of Minnesota, not long ago, carried the doctrine of damages for loss of prospective services and society of a child, to the length of holding that a mother might recover such damages in an action for personal injuries resulting in a miscarriage. The Supreme Court of that State has promptly and effectively repudiated so foolish a doctrine. The case was Tunnicliffe v. Bay, the judgment of reversal being recently rendered. The lower court had charged the jury that "if the plaintiff lost a child by reason of the liability of defendant in this case, you may give damage for it. The society, enjoyment and prospective services of the child is a recognized element in that regard, and you may give what it is reasonably worth." This charge, as the Minnesota Supreme Court says, was clearly erroneous. There was, of course, no proof in the case as to the prospective earnings of the child, even if the mother would be the proper person to recover for such loss. Nor would the loss of the child's society be a proper element of damages. While the jury is allowed to consider the case with all its facts, and to take into account, for the purpose of compensation, not only the physical pain, but also mental suffering, in determining the award of damages, and while, of necessity, this involves to some extent a consideration of the nature of the injury, and cannot exclude from the consideration of the jury the fact that the physical and mental suffering of the mother by reason of such an injury would be more intense than in the case of the ordinary fracture of a limb, yet beyond this it would not be competent for the jury to go, and to attempt to compensate for the sorrow and grieving of the mother.

The same conclusion was reached by the Supreme Court of Virginia, in Bovee v. Town of Danville, 53 Vt. 183, where the court said, that "if the violence done her person resulted in the miscarriage, the miscarriage was a legitimate result of such negligence. Any physical or mental suffering attending the miscarriage is a part of it, and a proper subject for compensation. But the rule goes no further. Any injured feelings following the miscarriage, not part of the pain naturally attending it, are too remote to be considered an element of damage. If the plaintiff lamented the loss of her offspring, such grief involves too much an element of sentiment to be left to the conjecture and caprice of a jury. If, like Rachael, she wept for her children, and would not be comforted, a question of continuing damage is presented, too delicate to be weighed by any scales which the law has yet invented."

To the same effect is the case of Butler v. Manhattan Ry. Co., 143 N. Y. 417, where in an action brought by a husband for loss of the wife's services, the trial court permitted the jury to consider as an element of recovery "any damages arising from the injury and resulting in depriving the plaintiff of prospective offspring." This was reversed on appeal, the court saying that "where the inquiry relates to the value of the life of a child, cut off in infancy, there are some material facts, capable of proof, which may be placed before the jury and which afford some aid in estimating the pecuniary loss suffered by parents or other relatives. The age and sex of the infant may be proved; its mental and physical condition; its bodily strength, and, generally, whether there was the apparent promise of a continued or useful life, or the contrary. The speculation which, in the present case, the jury were permitted to make had not even these safe-guards, slight as they are. They were allowed to estimate the pecuniary interest which a husband had in the chance that an embryo, not yet quickened into life, would become a living child. The sex could not be known, and if born alive the infant might have been destitute of some faculty, or so physically infirm as to have made it a helpless charge. There are no elements whatever upon which a jury could base any conclusion that a pecuniary injury had been suffered by the plaintiff from the loss of the unborn child, and this inquiry should have been excluded from the

consideration of the jury as too remote and speculative to form an element in the recovery."

The only case which is in seeming conflict with this doctrine is Smith v. Overby, 30 Ga. 241; but the Supreme Court of that State in the later case of Railroad Company v. Randall, 85 Ga. 297, in treating of a charge which permitted of a recovery for the pain, suffering, or sorrow resulting from miscarriage said, "we would suggest that the word 'sorrow' be omitted from the charge of the court on the next trial. It is most too remote to be considered an element of damage, unless it is that sorrow which accompanies the actual injury, and is suffered at the time of the miscarriage. The loss of a child by a miscarriage would affect women so differently that it would be hard for men, sitting as jurors, to estimate it as an element of damage; and we therefore think that it would be better to omit in the future any instruction to the jury upon the question of sorrow as an element of damage. Pain and suffering give a wide latitude to juries, and there are very few complaints made of the smallness of the amounts found by juries upon these two elements of damage," citing the case of Bovee v. Town of Danville, above alluded to.

NOTES OF RECENT DECISIONS.

FEDERAL COURTS—FOLLOWING STATE DECISIONS — VALIDITY OF LOCAL STATUTE.—In certain exceptional cases the federal courts do not feel bound to follow the decision of the Supreme Court of the State construing a State law or constitution. When the issue in a Circuit Court of the United States concerns transactions between individual entered into on the faith of a particular construction of a State law or constitution, and the Circuit Court enters a decree sustaining the validity of such construction, all before the Supreme Court of the State has expressed any opinion on the point, the Supreme Court of the United States will not reverse the decree of the court below, if it otherwise approves it, simply because meantime the State court has given the law or the constitution a different construction. This was the principle in Burgess v. Seligman, 107 U. S. 32, 2 Sup. Ct. Rep. 10. Nor, when transactions have been entered into by individuals on the faith of a certain construction which has been given to a State statute or constitution by the Supreme Court of the United States, will that court change its opinion because, subsequent to the transactions involved, the State Supreme Court has taken a different view. This was the case in Carroll Co. v. Smith, 111 U. S. 556, 4 Sup. Ct. 539. Nor, when different constructions have been given to a statute or a constitution by a State court, are the federal courts bound to follow the later decisions, if thereby contract rights which accrued under earlier rulings will be injuriously affected. This principle is established in Douglass v. County of Pike, 101 U. S. 677, Supervisors v. U. S., 18 Wall. 71, and Rowan v. Runnels, 5 How. 134. But in the case of Western Union Tel. Co. v. Poe, United States Circuit Judge Taft of the Ohio Circuit held, overruling his previous decision as to the constitutionality of the Ohio "Nichols" Taxation law, that where a Federal Court decides, on demurrer, that a State statute, the validity of which has never been passed upon by the highest court of the State, is in violation of the constitution of such State, and afterwards, but before a final decree is entered in the Federal Court, the State Supreme Court decides that such statute is constitutional, the Federal Court will reverse its former ruling in deference to the decision of the State court. Here, the court said, was not involved the validity or construction of a law on the faith of which individuals have made contracts, advanced money, or incurred liability. We have here simply a tax law fixing the obligation of artificial persons of a certain class to contribute to the support of the State. In respect of such a law, it would be anomalous and absurd to have a diversity of rulings between the State and the federal courts. The intolerable result of such a diversity would be that companies who could invoke the jurisdiction of the federal courts would not pay the tax, while all those who could not invoke that jurisdiction would be compelled to pay it. There is nothing in the decisions of the Supreme Court of the United States which gives the slightest warrant for supposing that, in the case of a State tax law, it would not follow the decision of the State Supreme

Court, whenever rendered, and however divergent from its own views the conclusion, provided no federal question was involved. In the State Railroad Tax Cases, 92 U. S. 575, 617, 618, the Circuit Court of the United States held that a tax law of Illinois was invalid, because in violation of the State constitution. Before the cases reached the Supreme Court of the United States, on appeal, the Supreme Court of the State decided that the law was valid. The Circuit Court decree was accordingly reversed. In Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. Rep. 466, Moores v. Bank, 104 U. S. 625, and Green v. Neal's Lessee, 6 Pet. 291, the Supreme Court reversed the ruling of the Circuit Court as to the effect of a State statute of limitation, solely because, after the decision by the Circuit Court, the Supreme Court of the State had given the statute a different construction. See, also, Stutsman Co. v. Wallace, 142 U. S. 293, 12 Sup. Ct. Rep. 227.

ACTION FOR PERSONAL INJURIES—FRIGHTENING HORSE — NUISANCE — EVIDENCE.—In Bemis v. Temple, 38 N. E. Rep. 970, the Supreme Judicial Court of Massachusetts, hold that in an action for personal injuries caused by plaintiff's horse being frightened by a flag hung by defendant over a street, evidence that ordinarily gentle horses were frightened by the flag is admissible in order to show that the flag was a public nuisance, rendering driving on the street unsafe. The following is from the opinion of Knowlton, J.:

In the present case the only collateral inquiry which could arise is whether a horse called by a witness "an ordinarily safe and gentle horse" comes within that class. Such an inquiry is certainly simple. We think there would be no practical difficulty in receiving and weighing testimony in regard to the conduct of horses which seem to be like ordinary horses in common use. This precise question has been decided in favor of the plaintiff's contention by many courts of the highest respectability, and we have been referred to no decisions to the contrary. In Brown v. Railway Co., 22 Q. B. Div. 391-393, which was an action for an injury caused by the shying of the plaintiff's horse at a heap of dirt, the court of queen's bench held that the plaintiff was rightly permitted to show that various other horses had previously shied at the same place, and all the judges of the Court of Appeals "were clearly of opinion that the evidence was admissible, and confirmed the decision of the queen's bench division." Crocker v. McGregor, 76 Me. 282, is to the same effect. House v. Metcalf, 27 Conn. 631, was a suit for maintaining a wheel which frightened the plaintiff's horse. The court says the plaintiff "had a right, not only to show the facts regarding its size, form, location, exposure to view, and mode of operation, from which the jury might infer what effects it would naturally, necessarily, or probably produce but also to prove what effects it had produced in fact. • • • The inquiry in every such case is not whether the evidence offered is sufficient to prove the fact claimed, but whether it tends to prove it." In Darling v. Westmoreland, 52 N. H. 401, a suit for damages caused by the fright of a horse at a pile of lumber, evidence was received that other horses had been frightened by the same pile. The justices of the Supreme Court of New York who sat in Champlin v. Village of Penn Yan, 34 Hun, 33 37, unanimously sustained the admission of evidence "that on another occasion prior to this accident a flag similar in appearance, suspended over the street in a similar manner, did frighten other horses driven along the street under the same." The Court of Appeals of New York takes a similar view of the law. Quinlan v. City of Utica, 11 Hun, 217, 74 N. Y. 603; Wooley v. Railroad Co., 83 N. Y. 121.

The defendant relies upon a line of cases in this commonwealth, brought against cities or towns to recover for accidents received while traveling on highways, in which it had been held that a plaintiff cannot introduce evidence of other similar accidents occurring at the place where he was hurt, for the purpose of proving that the way was defective. Collins v. Dorchester, 6 Cush. 396; Hall v. Lowell, 10 Cush. 260; Merrill v. Inhabitants of Bradford, 110 Mass. 505; Schoonmaker v. Wilbraham, *Id.* 134; Aldrich v. Pelham, 1 Gray, 510; Kidder v. Dunstable, 11 Gray, 342; Hinckley v. Barnstable, 109 Mass. 126. The ground on which these cases were decided is that such collateral inquiries would be opened, before the evidence could be properly received, as would multiply issues, for the trial of which the parties had had no opportunity to prepare, and would lead away from the main issue, and tend to confuse the jury. In most of these cases the facts and circumstances of other accidents were so diverse and complicated that the decisions rest on grounds which are generally deemed satisfactory. In others, if they were to be considered apart from authority, it may be that an effect of an attempt to pass on another occasion was so closely connected with the alleged defect, and so free from other possible contributing causes, that, as a simple experiment, it might well have been proved. Such evidence has sometimes been received in other jurisdictions. District of Columbia v. Armes, 107 U. S. 519-524, 2 Sup. Ct. Rep. 840; Morse v. Richmond, 41 Vt. 435; Darling v. Westmoreland, 52 N. H. 401; Calkins v. Hartford, 33 Conn. 57; Quinlan v. City of Utica, 11 Hun, 217, 74 N. Y. 603; City of Delphi v. Lowery, 74 Ind. 520; Chicago v. Powers, 42 Ill. 169; Morse v. City of Burlington, 49 Iowa, 136; City of Augusta v. Hafers, 61 Ga. 48. In this case we have no occasion to consider whether the strict construction put by this court in former years upon the statute giving damages for accidents caused by defects in highways, and the disinclination to look with favor upon claims brought under it, has led in some such cases to too great an extension of the rule excluding testimony involving collateral inquiries. This is not an action against a city or town. It presents a simple question in the law of evidence. It should be decided in accordance with sound principles, and this court has established precedents in favor of the plaintiff's contention that accord with those which we have already cited from other courts. In Reeve v. Dennett, 145 Mass. 23, 11 N. E. Rep. 938, upon the question of the effect of the use of a certain medicine in dentistry,

evidence was received that dental operations performed by a certain dentist who used the medicine were less painful than those performed by other dentists who did not use it. In Brierly v. Mills, 128 Mass. 291, to prove that an attachment would be effective on a certain loom, it was held competent to show that it worked successfully on another loom of similar construction. See, also, Gahagan v. Railroad Co., 1 Allen, 187; Hunt v. Gaslight Co., 8 Allen, 169; Com. v. Goodman, 97 Mass. 117-119; Fay v. Whitman, 100 Mass. 76; Hodgkins v. Chapell, 128 Mass. 197; Baxter v. Doe, 142 Mass. 558, 8 N. E. Rep. 415; Com. v. Leach, 156 Mass. 99, 30 N. E. Rep. 163; Shea v. Fabric Co., 38 N. E. Rep.—. A majority of the court are of opinion that the evidence offered should have been admitted.

TAXATION—PAYMENT—DURESS.—In Weston v. Luce County, decided by the Supreme Court of Michigan, it was held that the payment of illegal land taxes by the owner under protest, in order that a sale thereof may be effected, does not constitute payment under duress so as to entitle him to recover the same back. The court said in part:

The element of coercion is essential to the right, and payment must be made to prevent seizure or arrest. Peebles v. Pittsburgh, 101 Pa. St. 304; Dill. Mun. Cor., section 940; Taylor v. Board of Health, 31 Pa. St. 73; Commissioners v. Walker, 8 Kan. 431; Railroad Co. v. Commissioners, 98 U. S. 541; Lamborn v. Commissioners, 97 U. S. 181; City of Detroit v. Martin, 34 Mich. 170; Baker v. City of Big Rapids, 65 Mich. 76, 31 N. W. Rep. 810; Betts v. Village of Reading, 93 Mich. 77, 52 N. W. Rep. 940; Lumber Co. v. Manistee (Mich.), 59 N. W. Rep. 164. Whether this rule should extend to cases of payment to relieve land from a lien for taxes need not be discussed, as that question is not involved. The action is not based upon the claim that the land is in danger of sale, but that owing to the levy of the tax upon it and the requirement of the certificate, the plaintiff cannot sell the land. We are aware that in a case resembling this (State v. Nelson, Minn. 42 N. W. Rep. 548), upon *mandamus* brought by the purchaser to compel the treasurer to receive the valid portion of a tax and issue the certificate, the Supreme Court of Minnesota held that the proper remedy was for the owner to pay the tax and bring an action to recover it. But we are unable to agree with that decision. We consider it an extension of the rule, which we understand to limit payment to cases of threatened divestiture of property, under circumstances which would deny a judicial hearing before such divestiture, as in case of a sale of goods, or (in those States where it is held to apply to real estate) to cases where title to land is to be put in jeopardy by a sale for taxes. It does not include cases where payment is made from speculative motives, as to enable the owner to make an advantageous sale. If it did it might as well be held to apply to a case where a purchaser would be lost by reason of the existence of the tax as to one where the deed could not be recorded for want of a certificate. In fact, it would be equally applicable to any case where the outstanding tax is an impediment to any disposition that the owner might desire to make of the property. We do not deny that it might prove an embarrassment, but it does not follow that the public should be subjected to an action, for it does not fall within the reasons upon which the right depends. Instead of being a payment under duress of property, the seizure of which is threatened, it is almost a payment under duress of prospective profits. But this is not as meritorious a case as the Minnesota case, where the owner was not permitted to record her deed. In that case it was said: "Nor is it necessary, in order to constitute a compulsory, as distinguished from a voluntary payment that the unlawful demand be made by an officer who is prepared to enforce it by process. There may be that kind and degree of necessity or coercion which justifies and virtually requires payment to be made of the illegal demand of a private person, who has it in his power to seriously prejudice the property rights of another, and to impose upon the latter the risk of suffering great loss if the demand be not complied with. · · · Obviously, the question of necessity must be considered and determined under the circumstances affecting each particular case. The reasons of necessity upon which the law, in this particular, must be deemed to be founded, are applicable in full force in this case, and would have justified the payment of the tax in question, and subsequent recovery of it is illegal. The officer, of course, could not certify that the taxes were paid while the tax stood undischarged, and its validity undetermined. The register of deeds was prohibited by law from recording the deed until the fact of payment should be thus certified to him. The relator could not secure the recording of the deed by which she had acquired title to this land. If not recorded, she was liable, by force of our registry law, to be wholly divested of her title," etc. "The inducements which the law thus imposes upon a grantee of lands to pay a tax of inconsiderable amount, rather than to suffer his title to valuable lands to be thus jeopardized, may well be deemed to amount to compulsion. The coercion is certainly as real, and of substantially the same nature, as in case of a distress of goods." If it be conceded that "coercion" is a proper term to use in connection with that case, it is a negative coercion, while the case of the threatened seizure of goods is active. One is an inconvenience resulting from the application of a general rule of law to the circumstances in which the party places himself; the other, an unwarranted attempt to enforce an invalid claim by depriving him of specific property under color of process in its nature judicial. The plaintiff was at liberty to pay or not. If not, she was denied the privilege of recording her deed. The right to record the deed was no inalienable right. It originated in the liberality of the public. It was a privilege that she held in common with others. Unquestionably, the legislature might abolish the recording of deeds altogether, unless it was a constitutional right, and in that case the electors could do so. If this is so, can it be said that it was not within their power to make the right conditional, or to limit it to lands upon which the taxes should be paid? And, if it be, is it done at the expense of making the public liable for damages resulting from the inability of persons who are not entitled to the benefit of the act, because not able to comply with its conditions, or, what is substantially equivalent thereto, through payment and suit to recover the money? Why should it be assumed that the object of the law was to induce people to pay invalid taxes? Is it not quite as reasonable that the public policy, which makes the record of deeds desirable for the preservation of evidence of title, should also have a care for the prospective purchaser, and offer him some protection by an assurance that the taxes were paid up to the date of the record of the last deed? Several States have similar requirements, but we have never supposed that they

gave to persons the right to pay the taxes, and get the benefit of the registry, and then bring an action for the money paid, under the pretense that it was paid under duress, thereby removing clouds and quieting titles in courts of law.

"We very much doubt the policy of the law which would subject townships, counties and cities to actions under such circumstances. It is doubtless right that persons who pay money to avoid seizure of their chattels should be permitted to recover the same by action where such seizure would be a wrong, but we doubt the propriety of so extending the rule as to permit citizens to speculate upon such right. In the Minnesota case the county was subjected to an expensive suit to recover $6.25, so that the plaintiff might record her deed. But the reasons given for the decisions in that case do not exist here. There the owner was deprived of the benefit resulting from recording of her deed; here the plaintiff's deed is recorded, and he has all of the security that the record can afford. As already stated, his only complaint is that his purchaser is to be deprived of the right to record his deed without paying an invalid tax, which operates to lessen the price obtainable for his land. We think such a case is not within the rule."

CARRIERS—LIVE STOCK—ESCAPE OF CATTLE COMMUNICATING DISEASE — INTERSTATE COMMERCE.—In Grimes v. Eddy, 28 S. W. Rep. 756, decided by the Supreme Court of Missouri, it was held that a railway company which negligently allows Texas cattle to escape from its cars and run at large, thereby affecting native cattle with Texas fever, is liable for the resulting loss, and that courts will take judicial notice of the fact that Texas cattle have some contagious or infectuous quality which is communicable to native cattle. It was further held, however, that section 953 of the Revised Statute of Missouri, in so far as it provides that no railroad company or steamboat owner shall transfer through the State, Texas, Mexican, Cherokee or Indian cattle afflicted with Texas or Spanish fever, is void as an interference with interstate commerce, because in effect it entirely prohibits the transportation through the State of such varieties of cattle, as all of them contain microbes by which Texas fever may be communicated to native cattle. On the latpoint the court says:

But it is argued that as all Texas cattle, though not diseased themselves, have the means, power or quality, by reason of their nativity and their usual and normal condition, to communicate disease to native cattle, then it (the statute in question) must include all cattle coming from the South, and amounts to an absolute inhibition of their shipment into or through this State. Grant it that such is the effect, yet it seems clear that, if they are diseased or infected with a parasite which they communicate to and which destroys native cattle, the State has the same right, as a police regulation for the protection of the property of her citizens, to prohibit their importation into the State as it would have to prohibit the importation of persons affected or infected with some contagious and deadly disease. A part of a statute may be unconstitutional, and another part valid, even though the incongruous provisions be contained in the same section; or it may be unconstitutional with respect to its effect upon certain subjects or things embraced within its scope and application, and constitutional as to others. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being enforced according to the legislative intent, independent of that which is rejected, to the extent of the conflict and repugnancy it may not be enforced, while it is otherwise as to the provisions not repugnant to the constitution. Thus, that part of the statute which prohibits any railroad company or owner of a steamboat, or any other company or person from bringing into this State, for the purpose of transportation through the same, any of the diseased cattle of the kind and character mentioned in the act, may be held unconstitutional, and that part which prohibits the bringing into the State, or the driving on foot of such cattle from one part of it to another, may be upheld as a police regulation. Shipping such cattle by railroad or steamboat is attended with but little if any danger, as it is only when they come in contact with the ground with their feet, or by their droppings on the ground, that they are capable of imparting the fever to native cattle While the State has no power to prohibit the transportation of articles of commerce through it by common carriers, railroads and steamboats, it has the right to restrict the manner and mode of taking animals infected with parasites by which they communicate disease to native cattle, and to confine that mode to railroads and steamboats, if necessary in order, to prevent the spread of disease and contagion, which results in the destruction of the property of her citizens. "To the extent of the collision and repugnancy, the law of the State must yield; and to that extent, and no further, it is rendered by such repugnancy inoperative and void." Com. v. Kimball, 24 Pick. 359. It was held in Donnersberger v. Prendergast, 128 Ill. 229, 21 N. E. Rep. 1, that "because a portion of a statute is unconstitutional, it does not follow that a court may declare its other provisions void, if they are separable, and the valid portions are capable of enforcement independently of such provisions, unless it shall appear that all of the provisions of the act so depend on each other, operating together for the same purpose, or are otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other." "A legislative act may be entirely valid as to some classes of cases and clearly void as to others." Cooley, Const. Lim. 213. Thus, it has been held that the law prohibiting the sale of liquors may be void as to imported liquors and valid as to all other. State v. Amery, 12 R. I. 64; Tiernan v. Rinker, 102 U. S. 123.

The power to prevent the importation of diseased or infected cattle into the State, and the power to prevent the transportation of such cattle through the State over the great thoroughfares—railroads—or by river, rests upon very different principles. The one, as has been seen, may be regulated or prohibited by the State, in the exercise of its police power; while the other is a plain regulation of interstate commerce, a regulation extending to prohibition. Cattle thus transported are articles of commerce, and, whatever may be the power of the State over commerce that is altogether confined within its borders, it cannot prohibit or regulate that which is interstate. Texas

cattle, as a general thing, while having that peculiarity, not possessed by native cattle, of transmitting or communicating to them, through a microbe or parasite carried in their bodies, the Texas fever, are wholesome food, and extensively used for that purpose, and are to be found for sale as beef in many of the markets of the different States. The burdens imposed upon railroads for transporting them through the State are onerous, because of their liability to escape from the cars, and in that way and otherwise communicate disease to native cattle; and, to prevent such occurrenee, the State, as a police regulation, would clearly have the right to prescribe the kind of cars in which they shall be transported, and such precautionary measures as may be reasonably necessary for that purpose. The transportation of property from one State to another is clearly a branch of interstate commerce, and the statute is unquestionably a plain interference with such transportation; in fact, an absolute inhibition against it. The effect of the statute is to obstruct interstate commerce, and to discriminate between the property of one State and that of citizens of other States, and in so far as it prohibits the transportation of Texas, Mexican, Cherokee and Indian cattle through the State, by railroads and steamboats, conflicts with that provision of the constitution that provides that "congress shall have the power to regulate commerce with foreign nations and among the several States and with the Indian tribes." Leisy v. Hardin, 135 U. S. 132, 10 Sup. Ct. Rep. 681; Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. Rep. 862; Crutcher v. Com. 11 Sup. Ct. Rep. 854. The first clause of section 953, which provides that "every persons shall so restrain his diseased or distempered cattle, or such as are under his care, that they may not go at large off his premises, or the land to which they belong," has no application whatever to a case like the one in hand. It is evident from a casual reading of it that it only has application to cattle that are kept or herded upon some particular tract of land or premises. The mischief intended to be prevented by the act was the importation into the State of Texas, Mexican, Cherokee and Indian cattle, by which a disease, commonly called and known as "Texas fever," is communicated to domestic cattle; and although the statute mentioned cattle affected or infected with Texas or Spanish fever, the evident intention of the legislature was to include such cattle as were infected with microbe or parasite by which said fever is communicated. The act is entitled "An act to amend section 4358 of article 2 of ch. 87 of the Revised Statutes of Missouri, entitled "Of the Restraint of Diseased and Texas Cattle." Mr. Kent, in his Commentaries, volume 1, p. 461, says: "In the exposition of a statute, the intention of the law makers will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are explicit, the intention is to be collected from the context; from the occasion and necessity of the law; from the mischief felt and the remedy in view; and the intention is to be taken or presumed according to what is consonant with reason and good discretion." We must therefore hold that the statute is broad enough, when the object of the legislature is taken into consideration, to embrace cattle infected with microbes or parasites by which Texas fever is communicated to domestic cattle.

JUDICIAL SALE — CHILLING BIDDING.—In Gable v. O'Connor, 61 N. W. Rep. 131, decided by the Supreme Court of Nebraska, it appeared that a bidder at a judicial sale of real estate induced another bidder thereat to cease bidding, by the promise to pay him a sum of money for so doing, and by this means procured the real estate to be sold to him for a less sum than would otherwise have been realized from its sale. It was held, that the sale was fraudulent and invalid, and the purchaser obtained no title thereby, or by the deed executed and delivered to him in pursuance thereof, as against parties whose interests were defrauded; and the property may be recovered, in an action for such purpose, by the parties entitled thereto, and they will not be required to repay to him such portion of the purchase price paid by him as were expended to discharge mortgage or other liens and incumbrances from the property existing thereon at the time of the sale, including the lien under which such sale was made, or other moneys expended by him on the property or its title. The court said, *inter alia:*

The only remaining question is, will a court of equity order that appellant be repaid the purchase money which extinguished incumbrances upon the premises, existing prior to and at the time of the sale, and other expenditures made by him upon the property and its title? Is he entitled to any relief, or must it be denied him? He has invoked against the appellees the rule of equity that "he who seeks equity must do equity." We do not think he is in a position in this case to claim the benefit of the above rule. A maxim which we think more applicable to his position as indicated by the facts and circumstances adduced at the trial of the case is, "He that who hath committed iniquity shall not have equity" (Fran. Max., 8); and another, that "he who comes into a court of equity must come with clean hands." These have a direct application to the facts of the present case. The appellant, by his own fraudulent acts, has placed himself in such a position that the court can afford him no relief. All these payments were made in pursuance of, and as a part and in completion of, the sale which was made to him, and which was fraudulent as to the rights of appellees because of his wrongful acts and practices at and during such sale; and his right to be reimbursed all payments and expenditures must arise out of the sale, which was tainted with his fraud and wrong, and void in consequence thereof, and his claim derived from such a source cannot be recognized in any court. To require the appellees to repay what has been paid out by appellant in this case would not be enforcing the rule that "he who seeks equity must do equity." "The rule has no application to cases of actual fraud. It would be against good policy that it should, for it would act as an encouragement to unfair dealing. A man might gain, but he could not lose, by his frauds. If he succeeded, he would reap the fruits of his knavery; but, if detected, he would be entitled to a return of his money, and moreover, to be reimbursed to the value of his improvements'. Gilbert v. Hoffman, 26 Am. Dec. 103. The sale to appellant was void because of his wrongful and fraudulent acts at the time

of the sale, and he acquired no title as against appellees, and is not entitled to have the money paid out by him refunded, and this last, not by way of punishment, and not that the court would help or desire to aid appellees beyond the demands of justice and equity, but because by his own wrong the appellant has placed himself in such a position that the court is unable to grant him relief. McCaskey v. Graff, 23 Pa. St. 321; Gilbert v. Hoffman, *supra;* Sands v. Godwise, 4 Johns. 597; Elam v. Donald, 58 Tex. 316; *In re* Hays' Estate, 159 Pa. St. 381, 28 Atl. Rep. 158; Sheld. Subr. Sec. 44; Devine v. Harkness, 117 Ill. 145, 7 N. E. Rep. 52; Guckenheimer v. Angevine, 81 N. Y. 394; Railroad Co. v. Soutter, 13 Wall. 517; Martin v. Hodge (Ark.), 1 S. W. Rep. 694; Johnson v. Moore, 38 Kan. 90, 5 Pac. Rep. 406; German Bank v. U. S., 13 Sup. Ct. Rep. 702; Wilkinson v. Babbit, 4 Dill, 207 Fed. Cas., No. 17, 668; Perkins v. Hall (N. Y. App.), 12 N. E. Rep. 48; Acer v. Hotchkiss, 97 N. Y. 395.

NATURE OF EVIDENCE COMPETENT TO REBUT RECITALS IN JUDGMENTS AND DECREES AS TO JURISDICTIONAL FACTS.

It is claimed by Hermann in his work on Estoppels,[1] that the doctrine of collateral impeachment of records contained in Galpin v. Page and other modern cases of the Supreme Court of the United States, has made a sudden break in a long line of decisions which have firmly established the principle that the judgment of a court of record, a superior court, cannot be collaterally impeached; in other words, that a court record imports absolute verity for all purposes. This statement is plainly based upon an insufficient examination of authorities.

Common Law.—It is a principle of the old English common law, that "a man shall not be estopped by a record where the truth appears by the same record,"[2] and also, that "no man shall be estopped by the record where the thing averred is consistent with the record,"[3] and although it may be the tendency of modern English decisions to hold that a judgment imports absolute verity,[4] yet the old English doctrine was, that a judgment is *prima facie* evidence only against the defendant in the cause wherein it was rendered, and that it is impeachable collaterally as to the jurisdiction of the court and its power over parties and things in controversy, as well as for fraud.[5]

It is Old Doctrine in Our State and United States Courts.—An examination of the decisions of twenty-seven States upon this point reveals the fact that it is, in many of them, an old doctrine, based, evidently, upon the common law, announced in the earliest volumes of their reports and consistently upheld ever since.[6] In the Supreme Court of the United States, the principle that the jurisdiction of any court exercising authority over a subject, may be inquired into and impeached collaterally in every other court when the proceedings in the former are relied upon and brought before the latter, by a party claiming the benefit of such proceedings, was applied as early as 1794, in the case of Glass *et al.* v. Sloop Betsey;[7] again, by Chief Justice Marshall in 1808, in Rose v. Himeley,[8] where he said: "Upon principle, it would seem that the operation of every judgment must depend upon the power of the court to render that judgment, or, in other words, upon its jurisdiction; in 1828, in Elliott v. Piersol,[9] and by a long line of other decisions prior to the year 1873, and the decision in Galpin v. Page.[10] And in William-

[1] § 369.

[2] 4 Comyns Dig. Estoppel E., citing Coke Lit. 352b.

[3] 4 Com. Dig. Estoppel E., 3 Sm. L. C. 2013, Duchess of Kingston's Case; 80 Ala. 424; 47 Ill. 25.

[4] Story Conflict of Laws, § 607, note, citing cases.

[5] Buchanan v. Rucker, 9 East, 192; Rex v. Peckham, Carthew, 406; Bonaker v. Evans, 16 Ad. & El. 162; Capel v. Child, 2 Cr. & J. 558.

[6] Lack of space forbids mention of more than names of States and a few cases. Other cases will be cited throughout the article: New York, 5 Wend 148; 6 Hill, 415; 35 Super. Ct. 131; 19 Johns. Ch. 9; *Id.* 39 Massachusetts, 1 Mass. 404; 144 *Id.* 81. Vermont, 11 Vt. 425. Connecticut, 1 Day, 168; 30 *Id.* 6. Maine, 52 Me. 458. New Hampshire, 14 N. H. 156. Delaware, 4 Harr. 176. Pennsylvania, 10 S. & R. 240. New Jersey, 4 Zab. 222; 2 Harr. 345; 34 N. J. L. 286; 50 N. J. L. 546. Maryland, 16 Md. 176. Virginia, 6 Leigh, 570. Ohio, 13 Oh. St. 446; 27 *Id.* 600. Alabama, 80 Ala. 424. Georgia, 25 Ga. 90; 48 Ga. 50. Mississippi, 1 How. 61; 13 Sm. & M. 133; 44 Miss. 235. Tennessee, 2 Yerger, 402. Arkansas, 6 Eng. 157; 20 Ark. 12. Texas, 15 Tex. 500; 59 Tex. 576. Kentucky, 2 B. Mun. 453; 4 Littell, 268; Hardin 413; 3 J. J. Marsh. 105. Indiana, 4 Blackf. 2; 22 Ind. 17; 83 Ind. 417. Missouri, 88 Mo. 414; 94 Mo. 106. Illinois, 1 Ill. 331; 40 *Id.* 448; 57 *Id.* 348; 87 *Id.* 365; 125 *Id.* 236; 136 *Id.* 410; 148 *Id.* 536; 149 *Id.* 269. Kansas, 2 Kas. 70; 19 Kas. 451; 23 Kas. 528. Wisconsin, 9 Wis. 328. Iowa, 48 Ia. 197. Minnesota, 27 Minn. 265; 38 *Id.* 506. California, 3 Cal. 421; 30 *Id* 446; 53 *Id.* 635.

[7] 3 Dallas, 5.

[8] 4 Cranch, 240.

[9] 1 Peters, 328.

[10] In 21 other cases. See 4 Pet. 466; 6 *Id.* 729; 13 *Id.* 498; 6 Wh. 127; 3 How. 761; 6 *Id.* 186; 9 *Id.* 348; 24 *Id* 195; 3 Wall, 744; 5 *Id.* 305; 6 *Id.* 261; 9 *Id.* 812; 11 *Id* 259.

son v. Berry,[11] it was said to be a well-settled rule in jurisprudence, prevailing whether the decree or judgment has been given in a court of admiralty, chancery, an ecclesiastical court, or a court of common law, or whether the point ruled has arisen under the law of nations (as in Rose v. Himeley), the practice in chancery, or the municipal laws of States."

Collateral Impeachment by Extrinsic Evidence Discussed.—A case decided in 1873, however, boldly proclaimed a rule which, while acted upon in certain preceding cases, had never been publicly announced before by that court. Hitherto, the rule (presumably) acted upon (and laid down in some cases) was that the recital (of jurisdiction, or of due service of process, or of appearance) in a judgment or decree might be contradicted by evidence in the record, but the record itself was to be looked to for such impeaching facts, and the nature and effect of the decree or judgment were to be determined, and the findings of the decree construed, in the light afforded by an examination of the papers constituting the record alone.[12] But in Thompson v. Whitman,[13] Mr. Justice Bradley, being of the opinion that no decision had ever been made before on this precise point, held that the Circuit Court for the Southern District of New York was right in allowing the record of a judgment which recited jurisdictional facts to be impeached collaterally by extrinsic evidence, and reasoned that, if it once be conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegations contained in the record itself, however strongly made, can affect the right to question it, and that, if successfully invalidated as a record, no statements contained therein have any force. Thompson v. Whitman was affirmed, and its rulings followed in Knowles v. Gaslight Co.,[14] where a defective return, stating personal service, but not showing that service was made in the proper county, or where it was made, was contradicted by parol evidence (the testimony of the defendant and another witness), to the effect that the defendant was a nonresident, and was never served with process, and in Pennoyer v. Neff,[15] Thompson v. Whitman, and its rulings generally, were approved, though no special mention is made of the point of reception of extrinsic evidence. That you may contradict the record on jurisdictional points by extrinsic evidence, has also been held in a number of the States, as in Massachusetts, Texas, Kansas, New Hampshire, New Jersey, Virginia and Iowa,[16] but from the language in other Iowa, Texas and Virginia cases,[17] this is probably not the rule in those States.

Contradiction by Extrinsic Evidence in Cases of Unauthorized Appearance by Attorneys.—This rule has been applied very frequently in modern decisions, to cases where an unauthorized attorney appeared for the defendant, and the jurisdiction of the court over the latter has been impeached, necessarily, by evidence dehors the record, since the court, while holding the recital of the decree or judgment, that the defendant appeared by his attorney, conclusive evidence that the attorney appeared, held it only *prima facie* evidence of his authority to do so,[18] even in States where, as to other jurisdictional facts, the record itself must be inspected for impeaching evidence, as in Illinois[19] and in Iowa, where in the case of Harshey v. Blackmarr,[20] it was said the distinction between foreign and domestic judgments, by which the authority of attorneys to appear in the latter case could not be questioned, was without good foundation, the gravamen being the same in both, the unauthorized appearance of the attorney. The United States Supreme Court go farther in this respect than State decisions, for while the latter only hold the appearance of the at-

[11] 8 How. 540.
[12] Shriver's Lessee v. Lynn, 2 How. 59.
[13] 18 Wall. 457.
[14] 19 Wall. 59.
[15] 95 U. S. 714.
[16] Watson v. N. E. Bank, 4 Metc. 343; Bodartha v. Goodrich, 3 Gray, 508; Norwood v. Cobb, 24 Tex. 500; McNeill v. Edie, 24 Kas. 108; Thurber v. Blackbourne, 1 N. H. 242; Hess v. Cole, 3 Zab. (N. J.) 116; Van Fleet, Collateral Attack, § 483, and cases cited; Wilson v. Bank of Mt. Pleasant, 6 Leigh (Va.), 570; Pollard v. Baldwin, 22 Ia. 328.
[17] Mayfield v. Bennett, 48 Ia. 197; Letney v. Marshall, 79 Tex. 513; Marrow v. Brinkley, 85 Va. 55.
[18] Curtis v. Gibbs, 1 Penn. (N. J.) 377; Aldrich v. Kinney, 4 Conn. 380; Shumway v. Stillman, 4 Cowan, 292; Compher v. Anawalt, 2 Watts (Pa.), 490; Campbell v. Kent, 3 Pa. R. 75; Robson v. Eaton, 1 Term, 62; Sherrard v. Nevins, 2 Carter, 241.
[19] Bimelar v. Dawson, 4 Scam. (5 Ill.) 536; 3 Gilm. (8 Ill.) 197; 15 Ill. 415; 15 *Id.* 293; 38 *Id.* 163; 115 Ill. 33.
[20] 20 Ia. 328.

torney *prima facie* evidence of his authority, conclusive in the absence of contradictory evidence,[21] the United States Supreme Court, in Osborn v. U. S. Bank,[22] said: "No man has a right to appear as the attorney of another without the authority of that other. * * * There is, in the nature of things, no *prima facie* evidence that one man is, in fact, the attorney of another."

Recitals Controlled by Evidence in the Whole Record but not by Extrinsic Evidence.—But while it is said to be fully settled that extrinsic evidence, when not inconsistent with the record and not impugning its verity, is admissible for the purpose of identifying the points litigated and decided in a former action between the same parties, when the judgment therein is set up as a bar or estoppel in the case on trial,[23] and that the averments in the record may be explained by extraneous evidence when ambiguous, or made specific when generally expressed,[24] the writer is of the opinion that the rulings that the recitals or other contents of the record may be impeached as to jurisdictional facts, by evidence dehors the record, are extreme, and do not fairly represent the weight of authority, either of the United States Supreme Court or of the State courts, except, perhaps, in the instance above cited, where an unauthorized attorney has appeared for the defendant in the first case. The doctrine of Thompson v. Whitman and Knowles v. Gaslight Co., as to the general reception of extrinsic evidence, has been practically overruled, or rather, confined within narrower bounds, by later decisions. Galpin v. Page,[25] decided at the same term as Thompson v. Whitman, but from the language of the court in Thompson v. Whitman, it appears, a little later, and considered by the authorities the leading case on this point (1 Hermann on Estoppel,[26] says: "A case cited by all later writers and courts)," goes no farther than to say that "jurisdiction of the parties should regularly appear by evidence in the record of service of process or appearance." and held, in effect, that where the record was silent as to jurisdictional facts, there was no presumption that the court had acquired jurisdiction in some manner not recited in the record. Still later cases hold that when the question of jurisdiction is before the court, the papers constituting the record must be examined,[27] and in Settlemier v. Sullivan,[28] it was held (in a case where there was defective service) that the recital must be read in connection with that part of the record which gives the official evidence prescribed by statute; that this prevails over the recital in the decree, as the latter can only be considered (in the absence of an averment to the contrary) as referring to the former. The court cite and follow Galpin v. Page (although holding that presumptions as to jurisdiction are indulged in only when the record is silent as to jurisdictional facts), but says that "if the record gives the evidence, or makes an averment, with respect to a jurisdictional fact, it will be taken to speak the whole truth, and that no presumption will be allowed that other and different evidence was produced, or that the fact was otherwise than averred. In Robertson v. Cease,[29] the record into which the court looks to ascertain jurisdictional facts is defined as such portions of the transcript as properly constitute the record upon which we must base our final judgment, and in Cheeley v. Clayton,[30] the notice and return in the record were held to control the general recital in the decree. Nor is there in the other later jurisdictional cases[31] any open adherence to the rule in Thompson v. Whitman, the latest ruling of the court in Martin v. Gray,[32] being that jurisdiction is presumed unless it affirmatively appears that the court had none. The language of many State courts is most emphatic on this point, and it is expressly declared by many of them that the recitals of the judgment or decree can only be contradicted, varied or modified, limited, qualified or explained by other parts of the record itself.[33] Some courts declare,

[21] Price v. Ward, 25 N. J. L. 225.
[22] 9 Wh. 829.
[23] 2 Black on Judgments, § 624, citing many cases.
[24] 2 Bl. on Judgments, § 625.
[25] 18 Wallace, 350.
[26] § 369.
[27] Ry. Co. v. Ramsey, 22 Wall. 322; Bridges v Sperry, 95 U. S. 401; Bondurant v. Watson, 103 U. S. 281; Steamboat Co. v. Tugman, 106 U. S. 118; Brownsville v. Loague, 129 U. S. 505; Denny v. Pironi, 141 U. S. 125.
[28] 97 U. S. 448.
[29] 97 U. S. 648.
[30] 110 U. S. 708.
[31] Earle v. McVeigh, 91 U. S. 503; Windsor v. McVeigh, 93 U. S. 274; Hart v. Sansom, 110 U. S. 152.
[32] 142 U. S. 236.
[33] Barnett v. Wolf, 70 Ill. 81; Senichka v. Lowe, 74 Ill. 274; Prince v. Griffin, 16 Ia. 552; Barber v. Morris,

with Galpin v. Page, that the jurisdictional facts must appear affirmatively on the record. By far the greater number of cases so holding, however, are where the proceedings in Probate Courts were in question, the decision resting not so much upon the fact that the Probate Court is an inferior court, for in some States it is not so regarded, but upon the well-known principle that where jurisdiction is derived wholly from a statute, the provisions of that statute must be strictly followed, and the record must show upon its face affirmatively each jurisdictional fact.[34] The Kentucky Court of Appeals has made, in Green's Heirs v. Breckenridge's Heirs,[35] a strong and logical distinction in this respect between judgments at common law and decrees in chancery, the distinction being founded on the fact that, at common law, it is not necessary that proof should appear, it being the duty of the inferior tribunal to decide and record what is proved and not set down the evidence in detail, but that, in chancery, the evidence itself must appear in detail (that is, must be filed), and for this reason the rule is different as to the merits of the decree. No recital that such a matter was established ought to satisfy the revising court unless the proof shown is adequate. This distinction was insisted upon by counsel for the (successful) impeaching party in Webster v. Reid.[36] In many of the cases the recital of jurisdiction in the decree has been avowedly impeached by the sheriff's return, which is considered, sometimes, as one of the links in the chain of title, each of which must be examined to see if any one be defective.[37] Other cases hold the return a part of the record, of equal dignity and importing equal verity,[38] and the official evidence upon which the court based its findings;[39] in fact, the only legal evidence upon which the court could legally act in coming to the conclusion that the summons had been served,[40] and, therefore, the presence or absence of jurisdictional facts therein is deemed conclusive upon the subject. Such is the language of the court in the Ohio case of Moore v. Starks,[41] where it was said: "The return of the officer is the evidence to the court and to the world of the fact that the party has been subjected to the process or not; whether he has been brought into court. If the return is not service, it is proof equally explicit that no service has been made." Such is the effect of the decisions in the United States Supreme Court cases of Harris v. Hardeman and Cheeley v. Clayton,[42] the Missouri cases of Raley v. Guinn, Cloud v. Inhabs. Pierce City, Adams v. Cowles and Laney v. Garbee,[43] the Illinois cases of Belingall v. Gear, Pardon v. Dwire[44] and many others.

Phrase "Affirmatively Appears" Construed.—The language of other cases is more general and admits of an inspection of the whole record to establish or disprove the fact of jurisdiction.[45] Still others say, in general terms, if the record shows affirmatively that the court had not jurisdiction, the findings of the decree of jurisdictional facts may be impeached, and in the Illinois case of Smith v. Smith,[46] where a capias issued and was returned "not found," and there was judgment by default, it was held that the record showed affirmatively that the defendant was not served with process, and the judgment was considered as to him a nullity, the record not affording even a presumption in favor of the jurisdiction of the court. This language must be held to mean that the record shows affirmatively lack of jurisdiction when the facts set forth negative the presumption of jurisdiction.

Construction in California Case of Hahn v. Kelly.—The emptiness of this phrase, unless such a construction is placed upon it, has been thoroughly exposed in a vigorous

37 Minn. 194; Howard v. Thornton, 50 Mo. 291; McMinn v. Whalen, 27 Cal. 314; Cox v. Matthews, 17 Ind. 367.

34 Probate cases: (6 Yerger (Tenn.), 522, and Miss. cases in 3 Cushman, 513; 7 Sm. & M. 449. Other cases: 19 Kas. 462; 4 Yerger, 218; 39 Minn. 506; 1 N. H. 242; Denning v. Corwin, 11 Wend. 654, and Smith v. Fowle, 12 Wend. 9, so held, but on this point were expressly overrruled by Foot v. Stevens, 17 Wend. 483, followed by Hart v. Seixas, 21 Wend. 40.

35 4 T. B. Mun. (Ky.) 544.

36 11 Howard, 460.

37 Lipe v. Mitchell's Lessees, 2 Yerger (Tenn.), 402.

38 Raley v. Guinn, 76 Mo. 272; Hobby v. Bunch, 83 Ga. 1; Bliss v. Wilson, 4 Blackf. (Ind.) 169.

39 Settlemier v. Sullivan, 97 U. S. 448.

40 Hawkins v. Hawkins, 28 Ind. 66.

41 1 Ohio St. 373.

42 14 How. (U. S.) 334; 110 U. S. 708.

43 76 Mo. 272; 86 Mo. 357; 95 Mo. 507; 105 Mo. 355.

44 3 Scam. (4 Ill.) 575; 23 Ill. 574.

45 Penobscot R. R. Co. v. Weeks, 52 Me. 458; Clark v. Bryan, 16 Md. 176; Huls v. Buntin, 47 Ill. 339; Botsford v. O'Conner, 57 Ill. 77; Osgood v. Blackmore, 59 Ill. 265; Bannon v. People, 1 Ill. App. 497.

46 17 Ill. 482.

and exhaustive opinion by Mr. Justice Sanderson in Hahn v. Kelly:[47] "What do the cases mean," indignantly inquires the learned judge, "when they speak of a want of jurisdiction appearing on the face of the record? Do they mean a positive statement that something which must have been done, in order to give the court jurisdiction, was not done? * * * If so, they are a delusion and may well be characterized as cases

> 'That palter with us in a double sense:
> That keep the word of promise to our ear,
> And break it to our hope'—

pushed to its logical conclusion, the doctrine that a judgment cannot be attacked collaterally, though a want of jurisdiction appears on its face, is equivalent to saying no judgment can be attacked collaterally unless the record shows affirmatively upon its face that this or that thing was not done, or that no service of summons was had upon the defendant, language which, we venture to say, has never yet been found in any record. * * * No court has so far stultified itself as to render a judgment against a defendant, and, at the same time, deliberately state that it had not acquired jurisdiction over his person." It is claimed in Belcher v. Chambers,[48] that Hahn v. Kelly holds the doctrine of the conclusiveness of judgments of superior courts, but inasmuch as no case in the books is stronger in favor of collateral impeachment for want of jurisdiction, it would seem that the Honorable Court obtained its idea of the case at second-hand, from an opinion in Galpin v. Page (a case reported in 3 Sawyer, and a previous action to the one reported in 18 Wallace), which it cites as holding that view of the decision in Hahn v. Kelly, and both are clearly erroneous in their interpretation. Hahn v. Kelly holds that the presumption is in favor of jurisdiction only when the record is silent, and the parts of the judgment-roll one can inspect for impeaching facts when attacking a judgment collaterally in cases of judgment by default, are enumerated, *i. e.*, the summons, affidavit or proof of service (but not the affidavit and order for publication, which, it is said, are no part of the judgment-roll, and which, in this case, were the impeaching evidence offered, hence the adverse decision), the complaint, with default endorsed thereon and a copy of the judgment. It is said that where the judgment recites due service of process, it is a direct adjudication of the court upon the point, and is as conclusive on the parties as any other fact decided in the cause, provided it does not affirmatively appear from other portions of the record, consisting of the judgment-roll, that the recital is untrue. Then follows the exposition above given of the phrase "affirmatively appear," which, if language has any meaning, must be construed as upholding the doctrine of collateral impeachment for lack of jurisdiction.

Impeachment of Judgments in Cases Where the Court had Jurisdiction.—There is a definite distinction made between impeaching a judgment collaterally for want of jurisdiction and impeaching the judgment of a court which had jurisdiction. The latter, it is uniformly held, cannot be done, except in a direct proceeding. Orders which a court has a right to make can never be collaterally impeached, because, however erroneous, they are not void. Orders or judgments which the court has not power, under any circumstances, to render, are null, and their nullity may be asserted in any collateral proceeding where they are relied on in support of a claim [49] Finally, the doctrine of many, and, perhaps, the greater number of the best State cases is, that every intendment is made in favor of the jurisdiction of a court of superior jurisdiction; that nothing shall be intended to be out of its jurisdiction but that which specially appears to be so, as held in Peacock v. Bell,[50] a leading modern English case, and that where the judgment-roll or chancery record is silent (and by silent I take it, the meaning is, where no service of any kind is recited),[51] it will be presumed that the court had other and better evidence on which to base its finding,[52] yet the weight of authority also appears to be that presumptions in favor of the jurisdiction of superior courts can only be indulged in in the absence of proof and not against proof,[53] and that where the evi-

[47] 34 Cal. 405.
[48] 53 Cal. 635.

[49] 2 Mass. 124; 7 Mass. 83; 7 Cal. 53 64; 1 Ind. 130; 22 Ind. 17; 1 Peters (U. S.), 328; 10 Pet. 450; 13 Pet. 498.
[50] 1 Saunders, 73; Whitney v. Porter, 23 Ill. 447.
[51] See Boker v. Chapline, 12 Ia. 204.
[52] 21 Wend. 40; 1 Hill (N. Y.), 139; 95 Mo. 507; 34 Cal. 405; 7 Ind. 224; 8 Ind. 199; 12 Ind. 636; 83 Ind. 417; 60 Ill. 175; 80 Ill. 356; 87 Ill. 27.
[53] Withers v. Patterson, 27 Tex. 491.

dence is contained in the record, the reviewing court will not presume that there was other or different evidence given, as, for instance, that service was made in a better manner at some future intervening time,[54] but the finding of the court is construed in connection with the evidence presented by other parts of the record, and is presumed to be based upon it, and the record will be presumed to speak, not only the truth, but the whole truth, as to the particular fact of which it speaks,[55] for, as reasoned in Hahn v. Kelly, "by the law of its creation, it can tell no lies. This is not only so when it speaks in favor of the jurisdiction, but against it."

FLORA V. WOODWARD TIBBITS.

Chicago.

[54] 1 Freeman on Judgments, § 125; Crow v. Meyersieck, 88 Mo. 414; Barber v. Morris, 37 Minn, 194; Godfrey v. Valentine, 39 Minn. 336.

[55] Mickel v. Hicks, 19 Kas. 578, 27 Am. Rep. 161; Barnett v. Wolf, 70 Ill. 81; Hobby v. Bunch, 83 Ga. 1; 1 Freeman Judgments, § 130; Mayfield v. Bennett, 48 Ia. 197; Hawkins v. Hawkins, 28 Ind 66; Brown v. Woody, 64 Mo. 547; Barber v. Morris, 37 Minn. 194.

LIABILITIES OF TRUSTEE—INVESTMENT IN PERSONAL SECURITIES—ACQUIESCENCE BY BENEFICIARY—EVIDENCE.

HUNT V. GONTRUM.

Court of Appeals of Maryland, November 22, 1894.

1. A trustee investing the trust funds in personal securities does so at his own peril.

2. The failure of a testamentary trustee, who accepted from the executor unsecured notes in lieu of money in payment of the legacy, to collect the notes for 10 years the payee in the meantime becoming insolvent, renders him personally liable.

3. The fact that the *cestui que trust* wrote to the trustees to send him the notes so held in trust for him, stating that he presumed the notes "could be collected at any time," was not an acquiescence on his part with full knowledge of the circumstances, such as would relieve the trustee from liability.

ROBINSON, C. J.: Mrs. Miriam R. Lyons died in 1875, and by her will she bequeathed to Robert S. Hunt $1,000, "in trust for the sole use and benefit" of her nephew, William Galloway. Instead of demanding the payment of this legacy in money, as it was the plain duty of the trustee, he accepted from the executor of Mrs. Lyons certain promissory notes held by him, and among these notes was one of Thomas J. Peny, dated July 26, 1878, for the payment of $451.92. The interest on this note was regularly paid by Peny to the trustee till 1885, but from that time no interest has been paid, nor were any steps taken by the trustee to enforce the collection of the note. Peny died in 1888, and his estate, it is said, is insolvent, and Hunt, the trustee, died in 1889. This is a proceeding by the appellee, appointed trustee in the place of Hunt, against Hunt's executor, to recover the loss sustained by the *cestui que trust* on account of the Peny note. The case was submitted to the court below upon a written agreement of counsel; and the questions submitted for its determination are whether Hunt, trustee, ought and could have reduced the Peny note to money; and, secondly, whether Galloway, the *cestui que trust*, acquiesced or consented to the breach of trust by the trustee.

That it was the duty of the trustee to have taken proper steps at once to collect the money due on the note there can be no question. He had no right, in the first place, to accept the assignment of the note from Mrs. Lyons' executor in part payment of the legacy, but ought to have demanded its payment in money; and, if he did accept it, he ought to have proceeded at once to collect the note. In the absence of express authority in the instrument creating the trust, a trustee has no right to invest the trust money in personal securities, and, if he does, he makes the investment at his own peril; and, even where the investment is left to his discretion, it is well settled that it is not a sound discretion to invest in such securities. Walker v. Symonds, 3 Swanst. 62; Darke v. Martyn, 1 Beav. 525; Vigrass v. Binfield, 3 Madd. 62. In Holmes v. Dring, 2 Cox, 1, Lord Kenyon said: "No rule was better established than that a trustee could not lend on mere personal security, and it ought to be rung in the ears of every one who acted in the character of trustee." It is equally clear, too, we think, that the trustee could have collected the money due on this note if proper steps had been taken to enforce its payment in 1878, when it was assigned to him. Peny was at that time the owner of a farm containing 123 acres, for which he paid $3,000, and the only lien upon it from 1883 down to his death, in 1888, was a mortgage of $800. He had, besides, personal property worth at least $600. Dr. Franklin, the executor of Mrs. Lyons, says he was, at the time of the assignment, a prosperous farmer, and he considered him perfectly good for the payment of the note. Now, there is testimony to show that when Peny died, in 1888, ten years after he had accepted the note in part payment of the legacy, his estate was insolvent; but his ability to pay a note of $451 in 1878 is not to be decided by his pecuniary condition in 1888. In the meantime his real estate had depreciated in value, part of his personal property was gone,—had in fact diminished one-half in value,—and, besides, he had incurred other debts and liabilities. So, looking to the proof in the record before us, we are satisfied that this note could have been collected by the trustee if he had taken the proper steps for that purpose.

And this brings us to the remaining question,—whether there was any consent or acquiescence on the part of Galloway, the *cestui que trust*, to

the breach of trust by the trustee. If a trustee makes an improper investment of the trust fund at the request of the *cestui que trust*, or if the *cestui que trust* acquiesces in or consents to the investment, the trustee will not be held liable to make good the loss arising from such investment. But, to relieve the trustee from liability in such cases, the *cestui que trust* must be *sui juris*, and capable of acting for himself, and the acquiescence must be with full knowledge of the facts and circumstances, and with knowledge as to his legal rights. In Walker v. Symonds, 3 Swanst. 62, where the law on this subject was fully considered by Lord Eldon, a deed of compromise by a *cestui que trust* was rescinded, and the cotrustees held responsible for the loss of the trust fund, on the ground that the *cestui que trust* had not proper information of her own rights and liabilities of the trustees at the time of the execution of the deed. In this case it cannot be said that the acceptance by the trustee of the Peny note was done at the request, or with the consent, of Galloway, the *cestui que trust*, for he was at that time but eight years old. Nor do we find any acquiescence on his part, after his arrival at age, in the breach of trust committed by the trustee. He did, in 1885, write to the trustee, requesting him to deliver to him (Galloway) the several notes held in trust for him, and did express his willingness to accept the notes; but at the same time he says, "I presume they could be collected at any time." He did not know, nor had he a right to assume, that the maker of one of these notes (the Peny note), constituting almost one-half of the trust fund, was insolvent. He supposed, as he says, that the notes were good, and could be collected at any time. By no fair rule of construction can this letter of the *cestui que trust* be construed as an acquiescence on his part, with full knowledge of all the facts and circumstances connected with this note, and with knowledge of his legal rights, and the liability of the trustee for the failure to enforce the payment of the note at a time when Peny was solvent. We agree, therefore, with the learned judge below, that Hunt's estate must be held liable for the loss of the trust fund arising from the insolvency of the Peny note. Decree affirmed.

NOTE.—*Investments by Trustees.*—It is the duty of a trustee to invest the trust property so as to produce an income and if he suffers the trust money to lie idle when by a proper investment an income might be obtained, he will be liable for interest or for what would have been earned by the proper handling and investment of the estate. Knowlton v. Bradley, 17 N. H. 458; Barney v. Saunders, 16 How. 535; Andrew v. Schmitt, 64 Wis. 664; 4 Lawson's Rights, Remedies & Practice, 3459. A trustee being required by law to use his best "skill and judgment" in investing trust funds, his powers and discretion are not enlarged by the use in the deed of the words, "best skill and judgment." Kimball v. Reding, 31 N. H. 352. If a trustee keep the funds uninvested beyond a reasonable time, six months being usually allowed, he is *prima facie* liable for interest, and the burden is upon him to explain or justify the delay. Lent v. Howard, 89 N. Y. 169. A trustee empowered to invest the trust moneys "in any property, real or personal, that he may see fit," must invest the same in such manner as not only to secure the principal but to obtain an immediate income from the investment. Pray's Appeal, 34 Pa. St. 100. But a refusal to loan a trust fund at a usurious rate of interest is not a breach of trust, nor will the fund be withdrawn from the trustee to enable the *cestui que trust* to loan it at more than legal interest. Montjoy v. Lashbrook, 2 B. Mon. 261. Where the trust instrument expressly directs the securities in which the estate is to be invested, such directions must be exactly followed and a departure from the direction will make him liable for any loss occasioned thereby, while if a loss occurs as a result of his obedience he will not be charged. McGregor v. McGregor, 9 Iowa, 65; Clemens v. Caldwell, 7 B. Mon. 171. So one who lends the trust money contrary to the requirements of the statute does so at his own risk and in case of loss is liable to make it goo . Wadsworth v. Connell, 104 Ill. 369. Where the funds are directed to be invested in certain securities and such securities cannot be purchased, the trustee may invest in such manner as shall seem to him safe and productive. McIntire v. Zanesville, 17 Ohio St. 352. Where the trust instrument gives a general direction to the trustee in the choice of securities, he must nevertheless exercise that discretion with reasonable care and business prudence. Gilmore v. Tuttle, 32 N. J. Eq. 611; Bowman v. Pinkham, 71 Me. 295; Cromie v. Bell, 81 Ky. 646; Mayer v. Mordecai, 1 S. C. 383, 7 Amer. Rep. 26. A trustee who is exempted by the terms of the deed of trust from liability for anything except willful and intentional breach of trust, is nevertheless responsible for loss caused by making investments without making proper inquiries and exercising reasonable judgment concerning the value of securities taken. Tuttle v. Gilmore, 36 N. J. Eq. 617. Investments of trust funds must be made with a view to the good of the beneficiary and for no other purpose. They must not be made to favor friends nor to promote individual interests; but they must be made that the full benefit shall go where the creator of the trust intended it. Shuey v. Lotta, 90 Ind. 136. Where the trust instrument is silent as to the mode of investment, the trustee has no authority to invest the trust funds in personal security, however good (Clark v. Garfield, 8 Allen, 427; Will's Appeal, 22 Pa. St. 330; Smith v. Smith, 4 Johns. Ch. 281), nor in trade speculation or in manufacturing (Munch v. Cockerell, 5 Mylne & Cr. 178; Hemphill's Appeal, 18 Pa. St. 303; Ackerman v. Emmott, 4 Barb. 626; Kyle v. Barnett, 17 Ala. 306), nor in second or subsequent mortgages (Shuey v. Lotta, 90 Ind 136; Whitney v. Martin, 88 N. Y. 535; Gilmore v. Tuttle, 32 N. J. Eq. 611), nor in stock of a contemplated railroad or other corporation. Kimball v. Reding, 31 N. H. 352, 4 Am. Dec. 333; Adair v. Brimmer, 74 N. Y. 539. In England a trustee must not invest in bank stock or shares of manufacturing, railroad or other public companies, and the rule is the same in New York, Pennsylvania and other States. Pray's Appeal, 34 Pa. St. 100; Adair v. Brimmer, 74 N. Y. 537; King v. Talbot, 40 N. Y. 76; Tucker v. State, 72 Ind. 422; Gilbert v. Welsch, 75 Ind. 557. But in Massachusetts the rule is different. Harvard College v. Amory, 9 Pick. 446; Hunt's Appeal, 141 Mass. 515; Brown v. French, 125 Mass. 410. Also in Rhode Island. Peckham v. Newton, 15 R. I. 321. Trustees may rightfully invest in their own State securities or in those of the United States, and perhaps in those of other States of the Union. But *obiter* as to other foreign securities. Mills v. Hoffman, 26 Hun, 594. In

case of a trustee's improper investment the *cestui que trust* may elect to take the fund and the profits during the whole period, subject to all the losses of the business or to take the fund and legal interest thereon. Baker v. Disbrow, 18 Hun, 29. If a trustee makes investments at the instance and upon the importunity of the *cestui* the latter is estopped from seeking to charge him with a loss resulting. Clermontel's Estate, 12 Phila. 139. So a trustee who changes an investment of trust funds with the consent of the *cestui*, who is of legal age, is not liable for any loss growing out of such new investment. Campbell v. Miller, 38 Ga. 304, 95 Am. Dec. 389.

Recent Decisions on the Subject.—Under a declaration of trust the trustee, when the *cestui que trust* was 22 years old, was to invest the fund in a farm, and the necessary implements and stock, the latter to be given the *cestui que trust* absolutely, and the farm to be taken in the trustee's name. The trustee was also empowered to sell the farm at any time and invest in real estate securities. Held that, the trustee having power to sell the farm at any time, and invest in real estate securities, a court of equity could authorize him to make such investment directly, without first purchasing the farm. Milligan v. Pleasants (Md.), 21 Atl. Rep. 695. A trustee invested between one-fourth and one-fifth of the amount of trust fund in the stock of a railroad company, paying a premium therefor. The road had been constructed, at great expense, through new and comparatively unsettled country. It was heavily indebted, and its continued prosperity depended on circumstances so uncertain as to make the investment of trust funds in its stock a considerable risk. He shortly afterwards invested in it a second amount nearly equal to the first, and paid a higher premium for the stock. Held that, while both investments were made in good faith, he was not justified in putting so large a proportion of the fund into such stock, and he should be charged with the amount of the second investment. Appeal of Dickinson (Mass.), 25 N. E. Rep. 99, 152 Mass. 184. The provision of Gen. St. § 495, that trust funds "may" be invested in certain securities, does not prevent other investments; but while they will ordinarily be protected if they invest in the enumerated securities, however the investments result, they must justify investments in other securities. Clark v. Beers, 23 Atl. Rep. 717, 61 Conn. 87. A trustee is personally liable for trust funds invested in personal securities. *In re* Blauvelt's Estate, 20 N. Y. S. 119, 2 Con. Sur. 458; *In re* Mansfield, *Id.* Where trustees invest the principal of an estate in stocks at above par they are not required to retain from the income and add to the principal the difference between the price of the stocks and their par value. Hite v. Hite (Ky.), 20 S. W. Rep. 778. A trustee who has made a loan partly of trust money and partly of his own, and taken a note for the whole payable to himself individually, is liable for any loss of interest on the trust money, without regard to his motives in making the loan. *In re* Houges' Estate (Pa. Sup.), 28 Atl. Rep. 663. Trustees who are directed to hold, manage, and invest the trust funds, and pay the income to certain beneficiaries, cannot invest such funds in a hazardous mercantile undertaking, unless clearly authorized to do so. Adams v. Nelson (Super. Ct. Cin.), 31 Wkly. Law Bul. 536. See also article of Lyne S. Metcalfe, Jr., on "Nature of Securities upon which Trust Investments may be Made," 32 Cent. L. J. 526.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE—Action on Policy.—In an action on a policy insuring against death from "bodily injuries effected through external, violent, and accidental means, within the intent and meaning of the conditions" recited therein, the burden of proof is on the defendant to show that death was from one of the excepted causes.—ANTHONY V. MERCANTILE MUT. ACC. ASS'N., Mass., 38 N. E. Rep. 973.

2. ADMINISTRATION — Decedent's Estate—Widow.—Where one deeds land to his daughter, without the joinder of his wife, the wife is entitled, after his death, to a one-third interest in said land in fee, under Rev. St. 1894, § 2652 (Rev. St. 1881, § 2491), giving a surviving wife one-third of all the real estate of which her husband may have been seised during the marriage.—GRAVES V. FLIGOR, Ind., 38 N. E. Rep. 853.

3. ADVERSE POSSESSION.—Adverse possession of unenclosed, uncultivated, unimproved, and unoccupied land is not shown by evidence that one had it surveyed, and its boundaries marked by monuments, paid taxes on it for a few years, and from time to time cut trees on it for use on other land.—MISSION OF THE IMMACULATE VIRGIN V. CRONIN, N. Y., 38 N. E. Rep. 964.

4. ANIMALS—Vicious Dogs.—The owner of premises who, having knowledge of the vicious and dangerous character of a dog owned by his agent, permits the agent to retain him, and allow him to run at large on the premises, is liable for any damage he does to a passer-by—HARRIS V. FISHER, N. Car., 20 S. E. Rep. 461.

5. APPEAL—Presumptions.—Where an appeal from a judgment in favor of defendant is based on the judgment role above, it will be presumed in support of the judgment, that a judgment by default rendered in the action in favor fo plaintiff was for good cause set aside. —VON SCHMIDT V. VON SCHMIDT, Cal., 38 Pac. Rep. 361.

6. APPEAL — Supersedeas.—Where an appeal to the wrong court is prayed and allowed by the trial court, and perfected by filing bond, it suspends all further action on the judgment until it is disposed by of the Appellate Court, though such court has no jurisdiction of the appeal —SMITH V. CHYTRAUS, Ill., 38 N. E. Rep. 911.

7. APPEAL—Trial by Court.—Where an action at law is tried by the court without a jury, and no propositions of law are submitted to the court, there is no question of law for review by the Supreme Court.—STREATOR RECLINING CAR-SEAT CO. v. ROSE, Ill., 38 N. E. Rep. 910.

8. APPEAL—Writ of Error — Probate Jurisdiction.—Under Rev. St. ch. 3, § 124, which provides that appeals shall be allowed from all judgments, orders, or decrees of the county courts in probate matters to the Circuit Court, and from thence to the Supreme Court, no writ of error can issue in such a proceeding from the Supreme Court directly to the county court.—OETTINGER v. SPECHT, Ill., 38 N. E. Rep. 929.

9. ASSIGNMENT FOR BENEFIT OF CREDITORS — Parol Evidence.—A transfer of personal property by an absolute bill of sale cannot be shown by parol evidence to be an assignment for the benefit of creditors, since all such assignments must be by written instrument expressly declaring the trust.—PRICE v. LAING, Ill., 38 N. E. Rep. 921.

10. ASSIGNMENT OF GUARANTY.—H, K, and H, for a valuable consideration, executed and delivered to B a written guaranty that C would pay to B any and all indebtedness or liabilities which might then or thereafter be owing to B by C, not to exceed in amount the sum of $10,000, which written guaranty was a continuing one: Held that, B being the holder and owner of four promissory notes made to B by C, amounting to $11,000, which were overdue, B had the legal right to assign the written guaranty with the sale and transfer of the notes to a third party, such a written guaranty being assignable.—ANCHOR INV. CO. v. KIRKPATRICK, Minn., 61 N. W. Rep. 29.

11. ASSIGNMENT OF PATENT — Construction.—An assignment of a patent "and improvements on the same which may hereafter be made" does not include a patent subsequently granted the assignor for a machine to manufacture by a different process the same goods as were produced by the machine covered by the patent assigned, but which can be used without any of the machinery included in the earlier patent, and with out infringing thereon.—ALLISON BROS. CO. v. ALLISON, N. Y., 38 N. E. Rep. 956.

12. ASSUMPSIT — Complaint.—A complaint which states that plaintiff made a contract with an association, through its authorized officers, whereby it agreed to remunerate him for services rendered, and that the association had not made the payments agreed upon, and that the officers were liable for the amount due, does not state a cause of action against the officers personally.—NASH v. FERRABOW, N. Car., 20 S. E. Rep. 458.

13. ATTACHMENT — Forthcoming Bond.—An attachment defendant, after executing a forthcoming bond, is estopped to assert that the levy was invalid.—FENNER v. BOUTTE, Miss., 16 South. Rep. 259.

14. ATTACHMENT—Insufficient Voucher.—In an action on a money claim, a voucher stating the amount of the claim, but not on what account contracted, is insufficient to support an attachment.—BURK v. TINSLEY, Md., 30 Atl. Rep. 604.

15. ATTACHMENT OF PERSONALTY — Claim.—Where a claimant of property seized under attachment replevies it, and gives a bond for redelivery, the sheriff cannot seize the property under another attachment against the same defendant until such claimant's right to possession has been determined.—COOS BAY, R. & E. R. & NAV. CO. v. WIEDER, Oreg., 38 Pac. Rep. 338.

16. ATTORNEY AND CLIENT—Payment to Attorney.—Money received by an attorney from his client under a misapprehension on the part of the latter as to the purposes for which it is being paid, and under circumstances which require the attorney in good conscience to refund the same, may be recovered back.—LUTZ v. ROTHSCHILD, Cal., 38 Pac. Rep. 360.

17. BILL OF EXCEPTIONS — Time of Filing.—An indorsement on a bill of exceptions, "We agree upon the above and foregoing bill of exceptions," signed by opposing counsel during an extension of time for filing, made by an *ex parte* order in vacation, held binding as a consent to the enlargement of the time for settlement.—GULF, C. & S. F. RY. CO. v. JACKSON, U. S. C. C. of App., 64 Fed. Rep. 79.

18. CARRIER—Injury to Live Stock.—Where a common carrier unloads a shipment of horses at an intermediate point in the morning, and then reloads them late in the afternoon, but 12 hours before the departure of the train by which they are to be shipped, and against the owner's protest, and the horses are injured while thus waiting, the carrier is liable, though, by its contract, not responsible for unusual or unreasonable delay.—ALABAMA & V. RY. CO. v. SPARKS, Miss., 16 South. Rep. 263.

19. CARRIERS — Refusal to Deliver Goods.—Where goods shipped by a railroad company under a special contract as to charges are received by a connecting line without notice of the contract, with a waybill showing charges in excess of the contract price, and the connecting line, without paying such charges, carries the goods to their destination, and refuses to deliver them to the consignee on tender of the contract price (which is in excess of the amount due the connecting line), the latter is liable for damages sustained by the consignee for failure to deliver the goods after it has had a reasonable opportunity to ascertain the existence of the special contract.—ILLINOIS CENT. R. CO. v. BROOKHAVEN MACH. CO., 16 Miss., South. Rep. 252.

20. CONFLICT OF LAWS—Death by Wrongful Act.—In an action under the statute of a foreign State for death by wrongful act in such State, the amount recovered should be distributed according to the laws of the foreign State.—MCDONALD v. MCDONALD'S ADM'R., Ky., 28 S. W. Rep. 482.

21. CONSTITUTIONAL LAW — Uniform Operation of Statute.—The act passed by the general assembly April 27, 1893, entitled "An act to redistrict certain cities of the forth grade of the second class," is in conflict with the first branch of section 26, art. 2, of the constitution of Ohio, which requires that all laws of a general nature shall have a uniform operation throughout the State. — CITY OF KENTON v. STATE, Ohio, 38 N. E. Rep. 885.

22. CONTRACT—Gambling Contracts—Commissions.—It is a good defense to a note that it was given for the profits arising out of the purchase and sale of grain by the maker as plaintiff's broker, it being understood between them that none of the wheat should be delivered, but that the profits or losses should be determined by the fluctuating market prices, and that the maker should be at liberty, without consulting the payee, to deal with such persons as he might see fit.—NAVE v. WILSON, Ind., 38 N. E. Rep. 876.

23. CONTRACT—Illegality—Cancellation.—Where the parties are in *pari delicto*, an executed contract will not, as a general rule, be set aside because of want of authority to make it.—CINCINNATI, H. & D. R. CO. v. MCKEEN, U. S. C. C. of App., 64 Fed. Rep. 36.

24. CONTRACT— Rescission.—Where plaintiff's agent, through whom a contract for a loan was made with plaintiff, told defendant he would be unable to procure the loan by a certain time, and advised him to attempt to secure it elsewhere, there was a mutual abandonment of the loan contract, which relieved defendant from liability thereon.—EVERETT v. FARRELL, Ind., 38 N. E. Rep. 872.

25. CONTRACT — Services — Direction of Verdict. — Where the amount plaintiff was entitled to for services rendered and moneys expended under a certain contract with defendant did not appear from the evidence, and it was a disputed question whether all the services mentioned were actually performed, or, if so, they came within the contract, the court erred in directing a verdict for plaintiff.—COLORADO COAL & IRON CO. v. JOHN, Colo., 38 Pac. Rep. 399.

26. CONTRACT—Services—Quantum Meruit.—Where a

contract for services is proved, it is not necessary to show a fixed price for such services, but recovery may be had on a *quantum meruit*.—BUTTON v. HIGGINS, Colo., 38 Pac. Rep. 390.

27. CONTRACT—Services — Quantum Meruit.— Where plaintiff sues for services rendered under an implied contract, and defendant alleged a special contract, but admits the services, it is proper to charge that defendant, in order to limit a recovery by the special contract, must establish such contract by a preponderance of the evidence.—SANNS v. NEAL, Ohio, 38 N. E. Rep. 881.

28. CONTRACT—Offer—Withdrawal by Mail.—Where a letter withdrawing an offer for the purchase of goods was mailed in time to have reached the other party in the due course of mail before his letter accepting the offer was mailed, and it was shown that the letter of withdrawal was properly directed, and had a return card thereon, but that it had not been returned to the sender, the presumption that the letter was received in due time is, in the absence of rebutting evidence, conclusive. — SHERWIN v. NATIONAL CASH-REGISTER CO., Colo., 38 Pac. Rep. 392.

29. CORPORATION — Corporate Property—Sale under Mortgage.—Rev. St. art. 566, § 15, providing for the incorporation of private corporations for supplying the public with gas, light, or heat, and empowering them to mortgage their property, authorizes such a corporation to mortgage its entire corporate property.—PUMPHREY v. THREADGILL, Tex., 28 S. W. Rep. 450.

30. CORPORATION—County of Residence.—Where the record shows a railroad corporation to have an agent in a certain county, and is otherwise silent as to its domicile, such county may be deemed the residence of the corporation for the service of a citation upon its agents, under Rev. St. arts. 1393, 1394.—HUNT v. ATCHISON, T. & R. S. RY. CO., Tex., 28 S. W. Rep. 460.

31. CORPORATIONS—Election.—A director of a corporation cannot sue in equity to hinder or control the election of other agents of the company in the manner prescribed by its charter and by-laws, on any showing as to what such agents may or may not do, or intend to do; especially until he has tried the usual methods of relief, and invoked the action of the full board of directors —GREENOUGH v. ALABAMA G. S. R. CO., U. S. C. C. (Ala.), 64 Fed. Rep. 22.

32. CORPORATIONS—Statutory Liability of Directors. —Under 3 How. St. § 4161bl, providing that, if "any" of the directors of a manufacturing corporation "shall willfully neglect or refuse to make the report required by this section, they shall each be liable for all the debts of said corporation and subject to a penalty," etc., only such members of any board of directors as do so willfully neglect or refuse to make the report are liable for the debts or subject to the penalty.—GENNERT v. IVES, Mich., 61 N. W. Rep. 9.

33. CORPORATION.—Stockholders' Meeting—Validity.— The proceedings of a meeting not called in the manner prescribed by law may be ratified by all the absent stockholderf.—BENBOW v. COOK, N. Car., 20 S. E. Rep. 453.

34. COUNTIES—Swamp Lands— Donation.—A county cannot donate its swamp lands to a railroad company under the guise of a contract, whereby the company in consideration of the land to be conveyed, agrees to build a levee on the land for the purposes of drainage, and to lay its tracks on the levee, the company to have the right to leave openings in the embankment wherever it may see fit, and to put trustlework in place thereof.—ST. LOUIS, C. G. & FT. S. RY. CO. v. WAYNE COUNTY, Mo., 28 S. W. Rep. 494.

35. CREDITORS' BILL—Return of Execution.—A return of an execution unsatisfied on the day of issuance, by direction of plaintiff's attorney, indorsed on the writ, is insufficient to sustain a creditors' bill, subsequently filed.—SCHUBERT v. HONEL, Ill., 38 N. E. Rep. 913.

36. CRIMINAL APPEAL— Dismissal.—An appeal from a conviction will be dismissed where appellant has escaped from confinement, and has not returned into custody.—GATLIFF v. STATE, Tex., 28 S. W. Rep. 466.

37. CRIMINAL EVIDENCE—Larceny.—In a prosecution for larceny of liquor, testimony as to marks upon the barrels containing the liquor is competent to prove its identity.—STATE v. KIGER, N. Car., 20 S. E. Rep. 456.

38. CRIMINAL LAW—Chasity of Woman.—On a prosecution for seduction under promise of marriage, the chasity of the woman at the time of the intercourse must be proved.—NORTON v. STATE, Miss., 16 South. Rep. 264.

39. CRIMINAL LAW — Defective Recognizance. — A recognizance in a criminal case which requires appellant to "abide the judgment of the court of appeals," instead of that "of the court of criminal appeals," is fatally defective.—COOK v. STATE, Tex., 28 S. W. Rep. 476.

40. CRIMINAL LAW—Perjury.—An indictment for perjury, which alleges that a certain statement was material in the trial on which it was made under oath, and charges that such statement was false, is good.—CRAVEN v. STATE, Tex., 28 S. W. Rep. 472.

41. CRIMINAL LAW—Privilege of Witness—Criminating Testimony.— Const. art. 1, § 13, providing that "no person shall be compelled in any criminal case to be a witness against himself," relieves such witness from giving any evidence which in a criminal prosecution against himself might tend to establish the offense with which he may be charged.—EX PARTE COHEN, Cal., 38 Pac. Rep. 364.

42. CRIMINAL LIBEL—Slandering Innocent Woman.— In a trial for slandering an innocent woman (Code, § 1113) by charging her with having had sexual intercourse with defendant, where it was admitted that the charge was made, the only issue is whether prosecutrix was an innocent woman.—STATE v. MALLOY, N. Car., 20 S. E. Rep. 461.

43. CRIMINAL PRACTICE—Extortion.— Where threats of prosecution for perjury were made maliciously, and with intent to compel the one threatened to do an act against his will, the offense is complete, and it is immaterial whether the one threatened was guilty of perjury.—PEOPLE v. WHITTEMORE, Mich., 61 N. W. Rep. 13.

44. CRIMINAL PRACTICE—Mispelling of Word.— The mispelling of the word "twenty," in stating the denomination of a gold piece stolen, so that it reads "tenty," is no ground for arrest of judgment.—ALLEN v. STATE, Tex., 28 S. W. Rep. 474.

45. CRIMINAL PRACTICE—Theft.— An indictment for theft which states the value of the property by using the dollar sign is valid.—EARL v. STATE, Tex., 28 S. W. Rep. 469.

46. CRIMINAL TRIAL — Burglary.—On a prosecution for burglary, committed by breaking into a house with intent to steal, it is not necessary for the court to define "night-time."—LANE v. STATE, Tex., 28 S. W. Rep. 468.

47. DEATH BY WRONGFUL ACT.—No action lies for the death of one killed through defendants' negligent omission to shore up the roof of their mine.—MYETTE v. GROSS, R. I., 30 Atl. Rep. 602.

48. DECEIT—Sale of Lands.—Neither an agreement to sell land and cause a good title thereto to be conveyed to the purchaser at a future time, nor a deed without covenants, which recites the supposed source of the grantor's title, and purports to grant and convey the land, is sufficient to support an action against the vender for false and fraudulent representation as to his title, where he makes the agreement and deed in good faith, under color and claim of title, in the honest belief that the title and its source are good, although in fact they are both invalid.—UNION PAC. RY. CO. v. BARNES, U. S. C. C. of App., 64 Fed. Rep. 80.

49. DECEIT—Sale of Land — Misrepresentations.— Where the complaint alleged that defendant made representations concerning the land in question, which he knew to be false, for the purpose of inducing, and

which did induce, the plaintiff to contract to purchase said land, to her damage, his intent to deceive is implied.—SCHOELLHAMER v. ROMETSCH, Oreg., 38 Pac. Rep. 344.

50. DEED — Acknowledgment.—Where the certificate of acknowledgment or proof of the execution of a deed refers to the instrument itself in such manner as to connect the two, they may be considered together in determining the sufficiency of the proof of execution.—CLELAND v. LONG, Fla., 16 South. Rep. 272.

51. DEED—Homestead—Release.—A widow, to whom one of her husband's heirs had conveyed such heir's interest in the homestead, conveyed the same by a deed in the printed part of which was the usual form of release of homestead, but which stated in the written part that the grantor's intention was only to convey the interest of said heir: Held, that the deed did not release the homestead, the written part controlling the printed part.—LOVELESS v. THOMAS, Ill., 38 N. E. Rep. 907.

52. DEED—Unrecorded — Destruction by Grantee.—A grantee who voluntarily destroys an unrecorded deed, for the purpose of revesting title in the grantor, is estopped to assert title under such deed.—POTTER v. ADAMS, Mo., 28 S. W. Rep. 490.

53. DIVORCE — Both Parties at Fault.—Where the ground of an action for divorce is cruel and inhuman treatment, and the cross bill alleges the same ground, and it is found that both parties are at fault, neither is entitled to a divorce.—ALEXANDER v. ALEXANDER, Ind., 38 N. E. Rep. 855.

54. ELECTION—Validity.—The mere fact that a candidate at a village election acted as an inspector of election, in violation of Laws 1893, Act 202, does not render the election void.—PEOPLE v. AVERY, Mich., 61 N. W. Rep. 5.

55. EMINENT DOMAIN—Improvements Wrongfully on Land.—Where an entry is made by one vested with the power of eminent domain, without the consent of the owner, express or implied, the latter, in a proceeding to condemn, is not entitled to the value of improvements wrongfully placed upon the property to adapt it to the public use intended.—INTERNATIONAL BRIDGE & TRAMWAY CO. v. MCLANE, Tex., 28 S. W. Rep. 454.

56. EQUITY— Jurisdiction—Construction of Will.—A court of equity has jurisdiction to construe a will, or declare any of its provisions invalid, at the suit of a mere legatee, where the executors answer, and in terms submit the question of construction to the court.—DEAN v. MUMFORD, Mich., 61 N. W. Rep. 7.

57. FEDERAL COURTS — Circuit Court of Appeals—Jurisdiction.—The United States have a right to appeal to the Circuit Court of Appeals from an adverse judgment in the Circuit Court in a suit by a clerk of a district court to recover his fees under act March 3, 1887.—UNITED STATES v. MORGAN, U. S. C. C. of App., 64 Fed. Rep. 4.

58. FEDERAL COURTS—Circuit Courts—Jurisdiction.—Where several defendants, who might be sued either separately or together, or joined in one suit, brought in the Circuit Court, in a district of which only a part of them are residents, the jurisdiction of the Circuit Court depending only on diverse citizenship, the defendants who reside in the district where suit is brought cannot move to dismiss, on the ground of want of jurisdiction, under the act of congress of August 13, 1888, and the non resident defendants can only move to dismiss as to themselves, not as to the whole proceeding.—SMITH v. ATCHISON, T. & S. F. R. Co., U. S. C. C. (Kan.), 64 Fed. Rep. 1.

59. FEDERAL COURTS—Jurisdiction.—A bill must give jurisdiction in the district in which the suit is brought. Consequently, a bill is demurrable which sets out merely that the defendant is a resident of Virginia, since there are two judicial districts in Virginia.—HARVEY v. RICHMOND & M. RY. CO., U. S. C. C. (Va.), 64 Fed. Rep. 19.

60. FEDERAL COURTS—Powers—Removal of Prisoner.—Rev. St. §§ 5541, 5542, provide that, where a person convicted of an offense against the United States is sentenced to imprisonment for more than one year, the court which sentenced him may order the sentence executed in any State jail or penitentiary in the district or State, the use of which is allowed for that purpose by the State legislature, and that, where any such person is sentenced to imprisonment and confinement to hard labor, the court may order the sentence executed in any State jail or penitentiary in the district or State, etc.: Held, that such court has no power, after the expiration of the term in which such sentence is imposed, to order the removal of the prisoner from a State prison to a county jail.—UNITED STATES v. GREENWALD, U. S. D. C. (Cal.), 64 Fed. Rep. 6.

61. FEDERAL OFFENSE — Conspiracy in Restraint of Interstate Commerce.—A combination by railroad employees to prevent all the railroads of a large city engaged in carrying the United States mails and in interstate commerce, from carrying freight and passengers, hauling cars, and securing the services of persons other than strikers, and to induce persons to leave the service of such railroads, is within Act July 2, 1890, § 1, which provides that every contract, combination in the form of trust or otherwise, "or conspiracy in restraint of trade or commerce" among the States, is illegal.—UNITED STATES v. ELLIOTT, U. S. C. C. (Mo.), 64 Fed. Rep. 27.

62. FEDERAL OFFENSE — Counterfeit Money — Indictment.—An indictment under Rev. St. §§ 5431, 5457, for possessing and passing counterfeit notes and obligations of the United States, sufficiently excuses the failure to set them out by alleging that the grand jury did not have them in their possession or under their control, and did not know where they were, or that they were returned to defendant before the finding of the indictment, or that they were destroyed.—UNITED STATES v. HOWELL, U. S. D. C. (Cal.), 64 Fed. Rep. 110.

63. GARNISHMENT—Contesting Garnishee's Answer.—Code 1892, § 2145, requiring plaintiff, if he believes the answer of a garnishee to be untrue or incomplete, to contest it in writing at the term during which it was filed, is mandatory, and a motion to file a traverse to the answer at a subsequent term should be denied.—CONSUMERS' ICE CO. v. COOK WELL CO., Miss., 16 South. Rep. 259.

64. HIGHWAY—Establishment.—Rev. St. ch. 121, § 59, which provides that "any person interested in the decision of the commissioners in determining to or in refusing to lay out any road may appeal from such decision," does not authorize an appeal from the preliminary decision to grant the prayer of the petition to lay out the road, which decision the statute requires to be made before the termini of the roads are fixed, but the appeal must be from the final determination, made after the road has been located and the damages for opening it ascertained.—RAVATTE v. RACE Ill., 38 N. E. Rep. 933.

65. HUSBAND AND WIFE—Accounting.—Where a husband deeds his land to a third person, who deeds it to the wife, and afterwards the land is sold by the husband and wife, and the proceeds used by the husband as his own without objection from her, her heirs have no right, after her death, to compel him to account for such proceeds, the presumption being that they belonged to him.—DUVAL v. DUVAL, Ill., 38 N. E. Rep. 944.

66. HUSBAND AND WIFE — Dower—Relinquishment.—An agreement by a husband with his wife to take a specified sum of money named in her will in lieu of his dower interest in her lands, provided that she allow the will to stand as made, is valid as against creditors of the husband whose claims were in judgment prior to the agreement.—HUFFMAN v. COPELAND, Ind., 38 N. E. Rep. 861.

67. INSURANCE POLICY—Complaint—Proofs of Loss.—In an action on a fire insurance policy, an averment that plaintiff, as soon as she knew that the dwelling

had burned, at once, in writing, notified defendant, and that plaintiff was notified that defendant would not pay the policy, and that because defendant waived it by denying liability on account of vacancy of premises at the time of loss plaintiff did not make any proof of loss, shows a waiver of the proofs of loss.—PHŒNIX INS. CO. OF BROOKLYN v. ROGERS, Ind., 38 N. E. Rep. 865.

68. INSURANCE — Excluding Excepted.— In an action on a fire insurance policy providing that the "company shall not be liable for loss" from certain causes, the complaint need not allege that the loss was not caused by any of such causes.—BURLINGTON INS. CO. v. RIVERS, Tex., 28 S. W. Rep. 453.

69. INTOXICATING LIQUORS — Civil Damage.—Where, in an action for damages under the dramshop act, the evidence is conflicting, and much improper evidence is admitted on behalf of the plaintiff, and afterwards ruled out, it is reversible error to instruct the jury that "the law, as it stands upon the statute book of this State, should be enforced, and it is the sworn duty of the jury, in a proper case, to enforce it;" since the jury would infer that it was their duty to award exemplary damages.—HANEWACKER v. FERMAN, Ill., 38 N. E. Rep. 924.

70. INTOXICATING LIQUORS—Civil Damages.—In an action for damages for the sale of liquor to plaintiff's husband, where it is admitted that defendant, contrary to plaintiff's repeated request and warnings, sold to plaintiff's husband the liquor which made him drunk, and rendered him unable to work, it is proper to exclude evidence that defendant refused to sell him liquor when actually drunk.—WOLFE v. JOHNSON, Ill., 38 N. E. Rep. 886.

71. INTOXICATING LIQUORS—Constitutionality of Act.—The act entitled "An act to amend supplementary section 6946*a*, of the Revised Statutes of Ohio, passed April 12, 1888, and amended April 12, 1892, and to further supplement original section 6946, of the Revised Statutes," passed April 6, 1893 (90 Ohio Laws, 143), is not in conflict with the first branch of section 26, art. 2, of the constitution of Ohio, which ordains that "all laws of general nature shall have a uniform operation throughout the State," and is a valid law.—DRIGGS v. STATE, Ohio, 38 N. E. Rep. 882.

72. JUDGMENT—Limitations.—The statute of limitations does not begin to run against a judgment until it is entered and recorded.—HERRLICH v. MCDONALD, Cal., 38 Pac. Rep. 360.

73. LIMITATION OF ACTIONS—Assumpsit.—A warranty in a conveyance by another of lands belonging to the United States is broken the instant it is made, and a right of action on it then accrues, against which the statute of limitations at once commences to run.—PEVEY v. JONES, Miss., 16 South. Rep. 252.

74. MALICIOUS PROSECUTION—Probable Cause.—Dismissal of a warrant by a justice with the consent of the party prosecuting is a sufficient determination of the proceeding to authorize an action for malicious prosecution.—WELCH v. CHEEK, N. Car., 20 S. E. Rep. 460.

75. MARRIED WOMAN—Recovery for Goods Sold.—Under Pub. St. ch. 166, § 4, as amended by Pub. Laws, ch. 1204, § 1, providing that "any married women may make any contract whatsoever, the same as if she were single and unmarried, and with the rights and liabilities," an action may be maintained against a married woman to recover the price of goods sold to her, without joining her husband.—MERRIAM v. WHITE, R. I., 30 Atl. Rep. 601.

76. MASTER AND SERVANT — Fellow-servants—Negligence. — An instruction defining fellow-servants as "servants employed by a common master, whose relations are such that each as to the other, by the exercise of ordinary caution, can either prevent or remedy the negligent acts of the other, or protect himself against their consequences," is not objectionable as leaving out the element of co-operation, where the definitions given in other instructions supply the omission.—WENONA COAL CO. v. HOLINQUIST, Ill., 38 N. E. Rep. 946.

77. MECHANIC'S LIEN—Enforcement—Judgment.—Recovery of judgment for a debt does not bar the creditor's right to enforce a mechanic's lien therefor.—MAREAN v. STANLEY, Colo., 38 Pac. Rep. 395.

78. MECHANIC'S LIEN — Fraud — Mortgage.—A contractor signed a contract calling for a much larger price for the work than that actually agreed on, and gave a receipt for the excess as if it had been paid to him. This receipt was used by the owner to induce a third person to make a mortgage loan on the land by making him believe that so much had been paid for the improvements: Held, that the mechanic was guilty of such fraud as would estop him from claiming a lien superior to the mortgage.—HEIDENBLUTH v. FROMHOLD, Ill., 38 N. E. Rep. 930.

79. MORTGAGE. — A written agreement recited that defendant had bought certain personal property of plaintiff, that defendant was the absolute owner thereof, and that defendant agreed to convey it to plaintiff at a certain price, if paid within a specified time: Held that, in the absence of fraud, this agreement would not be construed to be a mortgage.—KERTING v. HILTON, Ill., 38 N. E. Rep. 941.

80. MORTGAGE—Cancellation—Fraud.—The fact that a mortgagor is induced by fraudulent representations to sign a mortgage without reading it renders it voidable merely, and therefore cannot be avoided in the hands of a person who in good faith advances money thereon.—DIXON v. WILMINGTON SAVING & TRUST CO., N. Car., 20 S. E. Rep. 464.

81. MORTGAGE—False Certificate of Acknowledgment.—An officer falsely certified an acknowledgment to a forged mortgage: Held, that the fact that the mortgagee induced him to do so was no defense to a suit therefor on his official bond, for the use of an assignee of the mortgage, since the assignee's right of action arose directly from his loss, and was not derived from the mortgagee.—WOLFE v. PEOPLE, Ill., 38 N. E. Rep. 898.

82. MORTGAGE—Foreclosure—Deed by Sheriff.—In a sheriff's deed under foreclosure proceedings by advertisement, the grantee was named and described as "Globe Investment Company, formerly Dakota Mortgage Loan Corporation:" Held, that such recital was no evidence that the Globe Investment Company had succeeded to the rights of the Dakota Mortgage Loan Corporation.—HANNAH v. CHASE, N. Dak., 61 N. W. Rep. 18.

83. MORTGAGE—Foreclosure—Production of Note.—Where a note or bond secured by a mortgage contains the only apparent evidence of the debt to which the mortgage is collateral, such note or bond must be produced at the hearing, or its absence properly accounted for. The reason for the rule requiring the production of the securities at the hearing is that the possession of the collateral security alone furnishes no conclusive evidence of the ownership of the debt thereby secured, and a proper transfer of the latter would entitle the possessor to the collateral security.—LENFESTY v. COE, Fla., 16 South. Rep. 277.

84. MORTGAGE—Foreclosure—Writ of Assistance.—A purchaser at foreclosure is not entitled to a writ of assistance against one in possession of the land under a tax deed, who was not a party to the action, or privy to any party thereto.—EXUM v. BAKER, N. Car., 20 S. E. Rep. 448.

85. MORTGAGE—Indemnity against Paramount Liens—If a mortgagee, holding a bond of indemnity against paramount liens, forecloses his mortgage, and bids in the property with such liens upon it, he purchases subject to the liens.—PIONEER SAVINGS & LOAN CO. v. FREEBURG, Minn., 61 N. W. Rep. 25.

86. MORTGAGES—Prior Mechanics' Liens—Payment.—A mortgagee may pay prior valid mechanics' liens on the land mortgaged, and, on foreclosure of his mortgage, he is entitled to be reimbursed the sum actually

paid before the sale in discharge of such liens.—FITCH v. STALLINGS, Colo., 38 Pac. Rep. 893.

87. MORTGAGE—Trustee for Bondholders — Compensation.—A trustee under a corporate mortgage is, in the absence of any agreement, entitled to compensation for his services, and has a lien on the trust property therefor.—PREMIER STEEL CO. v. YANDES, Ind., 38 N. E. Rep. 849.

88. MORTGAGE—Validity — Fraud. — Where a person who has a good education executes a mortgage without reading it, or requesting that it be read, supposing that it is a "lien" of some kind different from a mortgage, and is induced to execute by the false representation of a third person that it is not a mortgage, and that [they "could do away with it in 30 days," the mortgage is not void in the hands of an innocent purchaser.—MEDLIN v. BUFORD, N. Car., 20. S. E. Rep. 463.

89. MUNICIPAL CORPORATION—Ice on Sidewalk.—A city is not liable for injuries caused by a fall on a sidewalk, occasioned by a ridge of ice formed by the tramping, freezing, and melting of snow until the surface was uneven.—ROLF v. CITY OF GREENVILLE, Mich., 61 N. W. Rep. 3.

90. MUNICIPAL CORPORATION — Ordinances— Profane Swearing.—A town has no power to pass an ordinance forbidding the "use of profane language in the town," unless authorized by the legislature.—STATE v. HORNE, N. Car., 20 S. E. Rep. 443.

91. MUNICIPAL CORPORATION—Sewer—Failure to Repair.—Where a city has built a sewer partly on private property, it is no excuse for failing to repair the same that it has no right to go upon such property to make repairs.—NETZER v. CITY OF COOKSTON, Minn., 61 N. W. Rep. 21.

92. NEGLIGENCE—City—Defective Sewer.—In an action for the overflowing of plaintiff's basement through defendant city's negligent construction of a sewer, it is error to charge that, if defendant promised to remedy the sewer, and plaintiff believed said promise, and was justified in so believing, during the time that he so believed he is not chargeable with contributory negligence on account of defects in the construction of his building or the arrangement of his premises.—CITY OF VALPARAISO v. RAMSEY, Ind., 38 N. E. Rep. 875.

93. NEGLIGENCE—Coal Mines.—The primary object of the statute concerning "coal mines" (Sess. Laws 1885, pp. 137-141) was to secure the health and personal safety of all persons engaged in underground coal mining. While it is the duty of the "mining boss" to see that sufficient timber of suitable length and sizes is placed in the working places of the mine, the duty of securely propping the roof of the mine, by actually setting such timbers thereunder, is devolved upon any miner, workman, or other person having the control of any working place in the mine, and the willful neglect of such duty is a misdemeanor under the statute.—VICTOR COAL CO. v. MUIR, Colo., 38 Pac. Rep. 378.

94. PARENT AND CHILD—Action by Stepfather.—One who marries a widow, and treats her child as his own, stands in *loco parentis*, and cannot recover for necessaries furnished the child while a minor.—LIVINGSTON v. HAMMOND, Mass., 38 N. E. Rep. 968.

95. PARTITION—Jurisdiction.—Where a defendant in partition is in possession, claiming title adversely to the other parties, the court, having acquired jurisdiction for the purpose of partition, may settle by its decree the conflicting claims of title.—WILSON v. DRESSER, Ill., 38 N. E. Rep. 888.

96. PARTNERSHIP— Accounting.— On an accounting as to a partnership conducted for the purchase and sale of horses the value of horses that died during the continuance of the business should be deducted from the profits.—SMITH v. SMITH, R. I., 30 Atl. Rep. 602.

97. PARTNERSHIP— Trustee.— Where land belonging to a partnership is sold on foreclosure after death of all the partners, and the administrator of the last surviving partner buys the certificate of sale, and obtains a deed in his own name, the land being worth much more than the amount paid by him, he holds the title in trust for the heirs and widows of the deceased partners.—GALBRAITH v. TRACY, Ill., 38 N. E. Rep. 937.

98. PLEADING—Administrator — Plaintiff's Power to Sue.—Civ. Code, § 92, requiring the objection that the plaintiff has not legal capacity to sued to be raised by special demurrer, does not apply to the case of a suit by a foreign administrator for damages for injuries received by his intestate in Kentucky, the plaintiff in such case not being merely under disability to sue, but being also without any right of action.—LOUISVILLE & N. R. CO. v. BRANTLEY'S ADM'R, Ky., 28 S. W. Rep. 477.

99. PROCESS — Service of Corporations.—The vice-president of a corporatfon is an agent, within the purview of Rev. St. 1874, ch. 110, § 5, allowing service of summons, when the president of a company cannot be found, to be made upon "any agent of said company."—COOK v. IMPERIAL BLDG. CO., Ill., 38 N. E. Rep. 914.

100. PROCESS—Writ of Error—Service.—The service of a writ of error is properly made by lodging the writ in the court where the judgment sought to be reversed was recovered.—KENNESAW MILLS CO. v. BYNUM, Fla., 16 South. Rep. 276.

101. RAILROAD COMPANY—Fire—Constitutional Law.—Act March 31, 1887 (Rev. St. 1889, § 2615), rendering railway companies liable for fires communicated by engines, irrespective of their negligence is constitutional.—ADAMS v. ST. LOUIS & S. F. RY. CO., Mo., 28 S. W. Rep. 496.

102. RAILROAD COMPANY—Injuries at Crossing—Evidence.—In an action against a railroad company for personal injuries caused by a collision with a train at a crossing, evidence that another wagon crossed just before plaintiff attempted to do so, and that some unknown person told him to "come on," is admissible as *res gestæ* to disprove negligence on his part.—AUSTIN & N. W. R. CO. v. DUTY, Tex., 28 S. W. Rep. 463.

103. RAILROAD RIGHT OF WAY — Condemnation—Union Depot.—The necessity requisite for the exercise of the power, by one corporation, of condemning the property of another corporation under the right of eminent domain, exists whenever the plaintiff in the condemnation proceedings is acting within the scope of the authority conferred upon it by its charter, and the use to which it contemplates putting the land in question will not materially interfere with those to which, by law, the defendant is authorized to apply it.—ST. LOUIS, H. & K. C. RY. CO. v. HANNIBAL UNION DEPOT CO., Mo., 28 S. W. Rep. 483.

104. RECEIVER'S CERTIFICATES — Notice — Lien.—Where the receiver of an insolvent manufacturing corporation, without notice to its bondholders or general creditors, secured an order authorizing the issue of receiver's certificates, and issued such certificates, not for debts of the receiver, as such, but to creditors of the corporation for claims arising in the ordinary course of business prior to the receivership, held, that holders of such certificates were entitled to no priority, in the distribution of the assets of the corporation, over its other creditors, either secured or unsecured.—LAUGHLIN v. UNITED STATES ROLLING-STOCK CO., U. S. C. C. (N. Y.), 64 Fed. Rep. 25.

105. SALE—Breach of Warranty—Defenses.—Payment of a note given for the purchase price of chattels is not a bar to an action by the maker for breach of warranty on the sale, though, at the time of payment, the maker had discovered the breach of warranty.—GILMORE v. WILLIAMS, Mass., 38 N. E. Rep. 976.

106. SALE—Contract for Credit—Acceptance.—Where the purchaser of goods on credit accepted from the seller's salesman, without objection, a duplicate of the order containing a condition that "this bill becomes due immediately when the purchaser suspends pay-

ment, removes, or is closing out," and both parties afterwards referred to such order to settle a dispute as to the delivery of the goods, the purchaser is bound by such condition.—LINDSEY v. FLEBBE, Colo., 38 Pac. Rep. 397.

107. SALE — Illegal Stock Sales — Interest.—Interest cannot be recovered on money voluntarily placed in the hands of another for illegal speculation in stocks.—BALDWIN v. ZADIG, Cal., 38 Pac. Rep. 363.

108. SALE — Implied Conditions.—Plaintiff wrote defendant an unconditional offer to buy certain goods, and defendants wrote back, accepting the offer. The acceptance was unqualified, but was written on a letter head, at the top of which were printed the words, "All sales subject to strikes and accidents:" Held, that these words formed no part of the contract.—SUMMERS v. HIBBARD, SPENCER, BARTLETT & CO., Ill., 38 N. E. Rep. 899.

109. SALE—Stock Sales — Constitutional Prohibition.—Whether transactions between broker and customer for the purchase of stocks not immediately delivered, or of which an immediate delivery was not contemplated, were in contravention of Const. art. 4, § 26, prohibiting the sale of stocks on margin, is a question of fact to be determined in each particular case.—KULLMANN v. SIMMENS, Cal., 38 Pac. Rep. 362.

110. SALE OF CHATTEL—Implied Warranty.—Defendant telegraphed and wrote plaintiff, requesting it to ship a G mill, of same size and kind as one sold to the P. Salt Co., stating that he wanted the mill for grinding limestone. Plaintiff shipped a G mill, of the size and kind described, which proved unsuccessful in defendant's business as he wished to grind wet limestone, for which the mill was not adapted. In a letter written subsequently, defendant told plaintiff that one E (not connected with plaintiff) had recommended the mill, and he (defendant) thought he would try it: Held, that these facts failed to show that the purpose for which the article ordered was to be used was disclosed to the seller, and reliance placed on his judgment, so as to give rise to an implied warranty of fitness.—MORRIS v. BRADLEY FERTILIZER CO., U. S. C. C of App., 64 Fed. Rep. 55.

111. SEDUCTION—Action by Father.—Under Code, § 177, providing that every action must be prosecuted in the name of the real party in interest, a father may bring an action for damages resulting from the seduction of his infant daughter,—the loss of her services, the expenses of her illness, her death, and the consequent injury to his affections.—SCARLETT v. NORWOOD, N. Car., 20 S. E. Rep. 459.

112. SPECIFIC PERFORMANCE— Sale of Patent Right.—A contract between plaintiff and defendant provided that defendant was to work for plaintiff in perfecting certain electrical devices, and that when a company should be formed to manufacture them, 50 shares of stock were to be issued to defendant, or a sum of money paid in lieu thereof, in consideration of which defendant agreed to convey to plaintiff his patent rights in the devices. Defendant perfected the machines, and the company was formed, but no stock was issued to defendant, nor was any money paid to him: Held, that plaintiff was not entitled to specific performance of the contract to convey the patent rights.—ELECTRIC SECRET SERVICE CO. v. GILL ALEXANDER ELECTRIC MANUF'G CO., Mo., 28 S. W. Rep. 486.

113. TAXATION—Failure to Extend Levy.—Under Gen. St. § 2818 (Mills' Ann. St. § 3770), providing that any property omitted from the tax list through mistake or oversight shall be subject to assessment for all back taxes, property entered on such tax list, but upon which the tax levies were not extended, is liable for such unextended tax.—AGGERS v. PEOPLE, Colo., 38 Pac. Rep. 386.

114. TAXATION — Recovery of Taxes Paid—Duress.—Payment of illegal land taxes by the owner under protest, in order that a deed by him to a prospective purchaser may be recorded, does not constitute payment under duress, so as to entitle the owner to recover the same, though he would otherwise have lost a chance to sell the land to advantage. — WESTON v. LUCE COUNTY, Mich., 61 N. W. Rep. 15.

115. TENANTS IN COMMON—Rent.—A tenant in common, who alone occupies the common property, is not liable to his cotenants for rent, unless their actual ouster by him is proved.—MCLAUGHLIN v. MCLAUGHLIN, Md., 30 Atl. Rep. 607

116. TRIAL—Impeachment of Witness.—For the purpose of discrediting a witness, it may be shown that he was convicted of drunkenness, and confined in jail.—MCLAUGHLIN v. MENCKE, Md., 30 Atl. Rep. 603.

117. TRUST—Knowledge of Fraud.—The application by one partner of a trust fund in payment of his share of the capital stock of the partnership without the knowledge of his copartner does not impose on the firm assets a trust in favor of the *cestui que trust*.—GILRUTH v. DECELL, Miss., 16 South. Rep. 250.

118. VENDOR AND VENDEE — Forfeiture—Reasonable Time.—Where a contract for the sale of land provides that time shall be of the essence of the contract in all particulars, but each party waives the prompt performance of some of the covenants by the other, the vendor cannot thereafter cancel the contract, and declare the earnest money forfeited, for the vendee's failure to comply with the contract, without first giving him reasonable notice of his intention to do so.—WATSON v. WHITE, Ill., 38 N. E. Rep. 902.

119. VENDOR AND VENDEE—Purchase of Land—Notice of State of Title.—Parties and attorneys of record in a suit for the specific performance of a contract for the sale of land, who purchase the land under executions issued by them, take it with notice of the State of the title as declared by an opinion rendered in the suit reversing a decree and remanding the case.—ROCKWELL v. COFFEY, Colo., 38 Pac. Rep. 376.

120. VENDOR'S LIEN — Enforcement against Purchaser.—Where a deed of land acknowledges receipt of the full purchase price, though notes were given for a part thereof, the grantor cannot, as against a subsequent purchaser without notice that the price is not all paid, claim a vendor's lien.—MARYLAND LAND & PERMANENT HOMESTEAD ASS'N OF BALTIMORE COUNTY v. MOORE, Md., 30 Atl. Rep. 605.

121. WATERS—Riparian Rights.—A plat of that part of a quarter section "lying east of the North Branch of the Chicago river" showed a line along the course of said branch parallel to a like line on the opposite side of the stream. The evidence showed that this line was intended to show the bank of the river when it should be improved: Held, that this did not constitute a dedication to the public of the land lying between said parallel lines.—CITY OF CHICAGO v. VAN INGEN, Ill., 38 N. W. Rep. 894.

122. WAY BY NECESSITY—Suit to Recover.—In an action to recover a way by necessity, the fact that the jury found that the plaintiff "is now" the owner of land remote from a highway, instead of that he owned the land at the commencement of the suit, is immaterial where it is a necessary deduction from the pleadings that plaintiff was then the owner of the land.—MILLER v. RICHARDS, Ind., 38 N. E. Rep. 854.

123. WILL CONTEST—Undue Influence.—The mere presence of the chief beneficiary under a will at the time the will was signed is not evidence of undue influence.—DELGADO v. GONZALES, Tex., 28 S. W. Rep. 459.

124. WILL—Powers of Executors.—A testator, after making a number of legacies, provided that the residuary estate, both personal and real should "be divided into two equal parts. One part shall belong to the G school in trust, the principal to be invested, and the income only to be applied for the benefit and use of said school:" Held, that the executors had no implied power to sell the residuary realty in order to divide it, the school being entitled to half of the residuary realty and personalty just as it was left by the testator.—GAMMON v. GAMMON THEOLOGICAL SEMINARY, Ill., 38 N. E. Rep. 890.